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Let's Shake on it: Perceived Pre-contractual Risk in Cross-border Investment

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Let's Shake on it: Perceived Pre-contractual Risk in Cross-border Investment

Kevin J. Fandl, J.D., Ph.D.*

This article asks whether a legal system that provides protection for commitments made prior to contract formation is more or less conducive to risk-taking by foreign investors than a legal system that does not. I surmise that increased levels of protection for pre-contractual commitments establish an environment more hospitable to new business development, giving potential entrepreneurs added security in their ventures. And I further surmise that different legal traditions provide different levels of protection for these pre-contractual commitments.

To better understand the risks faced by cross-border business investors, this article describes the key distinctions between legal systems that create potential liability for an unwitting investor and how they affect pre-contractual liability. It then links these risks with levels of investment by performing a quantitative assessment of the relationship between legal tradition and entrepreneurial activity, followed by a contextual analysis of conversations with cross-jurisdictional legal practitioners. It concludes by showing the distinctions in pre-contractual liability rules between civil and common law legal systems have a significant impact on potential investment.

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INTRODUCTION

This article addresses whether perceived risks from the attachment of liability during pre-contractual negotiations affects cross-border investment. It addresses risks that result from differences in legal traditions between common and civil law countries. These risks can be mitigated to some extent by effective legal counsel; however, they may also serve as a deterrent to potential entrepreneurs looking to business abroad.

Nobel laureate Douglass North identified the institutional environment of a country as a significant factor in determining that country's economic growth trajectory. To North, institutions set forth the "rules of the game," which provided economic actors with predictable legal and policy environments within which to operate. The more effective the institutions, the more likely the economic growth.

North identified contract enforcement as one of key aspects of effective institutions.¹ In the absence of state enforcement of contracts, religious or moral concepts provide the only means of enforcement.² The rise of institutions such as courts and effective laws, along with improved respect for the law—often termed “rule of law”³—allowed for the establishment of more complex and long-term contracts. The predictability of contract enforcement became an incentive to trust beyond a small circle of known associates.⁴

A key indicator of the strength of a society’s rule of law is the effectiveness of contract enforcement in that society, a function of the courts in most instances. A party’s trust in its legal institutions often depends on whether those institutions will protect parties against unfair dealing and contract breach.⁵ A positive societal perception of their institutional strength and willingness to enforce contract law affects that society’s economic performance by providing the guarantees necessary to facilitate effective business development.⁶ Inefficient institutions, therefore, fail to provide the environment necessary to sustain effective business growth and economic development.

The idea that legal institutions play a role in facilitating an effective commercial environment is not new.⁷ Political economist, Douglass North, described institutions as the “humanly devised constraints that structure political economic and social interaction” in 1991.⁸ In that article, North used a number of commercial examples to explain the importance of having effective legal institutions in place to protect transactions beyond the small circle of family and known associates, allowing for long-distance

¹ Douglass C. North, *Institutions*, 5 J. OF ECON. PERSPECTIVES 97, 102 (1991) (explaining that effective enforcement of contracts will permit more complex forms of economic exchange).

² *Id.* at 99 (describing religious precepts as establishing the “standards of conduct” among parties in the absence of a state).

³ See, e.g., Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, 2012 SING. J. OF LEGAL STUD. 232, 233.

⁴ See, e.g., Anthony J. Bellia, *Promises, Trust, and Contract Law*, 47 AM. J. OF JURIS. 25, 29 (2002) (discussing the role of trust in facilitating contracts outside close networks).

⁵ See, e.g., *Enforcing Contracts*, WORLD BANK, <http://www.doingbusiness.org/data/exploretopics/enforcing-contracts/good-practices> (last visited Jan. 29, 2019) (footnote omitted).

⁶ See Rafael La Porta, et al., *Law and Finance*, 106 J. POL. ECON. 1113, 1140 (1998) [hereinafter *LLSV*]; see also Carmine Guerriero, *Legal Traditions and Economic Performances: Theory and Evidence* (Nov. 14, 2010), ENCYC. OF LAW AND ECON., Francesco Parisi and Richard Posner, eds., (Forthcoming; Amsterdam Ctr. for Law & Econ. Working Paper No. 2010-12).

⁷ See generally, Douglass C. North, *Institutions and Economic Theory*, 36 THE AM. ECON. 3 (1992).

⁸ North, *supra* note 1, at 97.

trade.⁹ His theory built on previous work of Ronald Coase, who highlighted the relationship between effective contract enforcement and institutional quality.¹⁰

Later scholars built upon the work of Coase and North and began connecting a state's economic performance with not only the quality of its institutions but to the legal system that those institutions enforce. A controversial article written by a group of Harvard and University of Chicago scholars in 1998, linked legal tradition with economic performance and, more precisely, suggested that civil law traditions yield less effective institutions than common law traditions.¹¹ They expound upon their "Legal Origins" theory in a more recent paper in which they argue that civil law embraces "socially-conditioned private contracting" whereas common law supports "unconditioned private contracting."¹²

The resulting analysis from these scholars was integrated into the World Bank's Doing Business series, which advises about the investment climate on the basis of a number of factors, including institutional effectiveness.¹³ Institutional effectiveness, a measure of quality governance, was measured in part by the effectiveness of contract enforcement.¹⁴

Numerous excellent research papers and case studies explore the relationship between legal tradition and business environment.¹⁵ They assess elements such as institutional capacity, enforcement of contracts and legal obligations, and transparency. Yet one element not sufficiently addressed is the effect of distinct legal traditions on the pre-contractual environment for doing business. In other words, does legal tradition impact the willingness of a party to take the risk of engaging in potentially

⁹ *Id.* at 100 ("Such societies need effective, impersonal contract enforcement, because personal ties, voluntaristic constraints, and ostracism are no longer effective as more complex and impersonal forms of exchange emerge.").

¹⁰ See Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

¹¹ Rafael La Porta, et al., *The Quality of Government* 7 (Nat'l Bureau of Econ. Research, Working Paper No. 6727, 1998) (finding that more government intervention, which is associated with civil law governments, yields lower efficiency).

¹² Rafael La Porta, et. al, *The Economic Consequences of Legal Origins*, 46 *J. OF ECON. LIT.* 285, 288 (2008); see also Katharina Pistor, *Legal Ground Rules in Coordinated and Liberal Market Economies*, *CORPORATE GOVERNANCE IN CONTEXT: CORPORATIONS, STATES, AND MARKETS IN EUROPE, JAPAN, AND THE US* (Klaus J. Hopt et al. eds., 2006).

¹³ See *Doing Business*, WORLD BANK, www.doingbusiness.org (last visited Jan. 29, 2019).

¹⁴ See *DOING BUSINESS*, WORLD BANK, *DOING BUSINESS 2018: REFORMING TO CREATE JOBS* 12 (2017) (identifying "Enforcing Contracts," measured by the time and cost to resolve disputes, as one of 11 areas of business regulation).

¹⁵ Ralf Michaels, *Symposium on Legal Origins: Comparative Law By Numbers? Legal Origins Thesis, Doing Business Reports, and The Silence of Traditional Comparative Law*, 57 *AM. J. COMP. L.* 765 (2009).

risky business negotiations that may not result in a contract and that may, ultimately, cause a party to change position in a way that causes them harm?

A contract is not simply a set of formal promises made between parties; it is a series of acts that bring parties together into a commercial relationship. These acts may include letters of intent, oral negotiations, non-disclosure agreements, draft versions of a final contract, and ultimately the establishment of formal contract terms. All of these actions require some risk and commitment of resources by the intending parties, which would likely not happen in the absence of the security provided by contract law. Courts in most developed countries provide protection for finalized contracts; however, different legal systems provide varying protections for parties in earlier stages of contract formation, thereby creating distinct legal environments for the promotion of business development.

The best way to avoid liability and uncertainty in conducting cross-jurisdictional commercial transactions is to have experienced legal counsel guiding the process. However, high costs and a belief that lawyers may hinder the entrepreneurial drive of a newer firm has led some firms to engage in some of their cross-border work *sans* legal counsel,¹⁶ despite the array of business advice against that approach.¹⁷ Even with the assistance of counsel, working across legal jurisdictions often requires consultation with foreign experts who understand the unique elements of their own legal system.¹⁸ This places foreign investors without appropriate counsel in a precarious position.

In this paper, I will examine pre-contractual liability in common law and civil law systems as a marker of institutional efficiency and business opportunity. I will build upon North's institutional analysis theory by showing how transaction costs are higher in civil law systems that impose

¹⁶ Cliff Ennico, *How to Hire an Attorney*, ENTREPRENEUR, 2015 ("Most small businesses put off hiring a lawyer until the sheriff is standing at the door serving them with a summons.").

¹⁷ See, e.g., Michael Acosta, *Why Your New Business Needs a Lawyer Yesterday*, ENTREPRENEUR, May 23, 2014; see also Padraig Walsh, *How to Know if Your Startup Needs a Lawyer*, FORBES (Oct. 21, 2016, 2:20 AM), <https://www.forbes.com/sites/walshpadraig/2016/10/21/when-do-startups-need-lawyers/#7e805bad447b>; Daniel Doktor and Sarah Reed, *Why Lawyers Make Good Early-Stage Startup Hires*, HARV. BUS. REV. (May 2, 2016), <https://hbr.org/2016/05/why-lawyers-make-good-early-stage-startup-hires>.

¹⁸ See, e.g., Ettore A. Santucci, *How Can U.S. and Non-U.S. Lawyers Work Together to Improve Opinion Practice in Cross-Border Transactions?*, BUS. L. TODAY (Jan. 19, 2017), <https://businesslawtoday.org/2017/01/how-can-u-s-and-non-u-s-lawyers-work-together-to-improve-opinion-practice-in-cross-border-transactions/> (explaining the difficulties faced by businesspeople that rely on their local counsel while attempting to work in foreign jurisdictions).

liability prior to the conclusion of a contract than in common law systems that do not. I will also build upon La Porta's theory by showing how parties can avoid the trap of inefficient contract institutions through effective legal counsel,¹⁹ to understand how firms change their behavior on the basis of the presence or absence of effective institutions, and how this promotes the environment necessary for effective business development.²⁰

This article begins by explaining the importance of understanding the risks of pre-contractual liability in cross-jurisdictional investments, highlighting the gap between a potential investor's "gentlemen's agreement" and a valid legal commitment. It moves on to compare legal traditions with respect to their treatment of pre-contractual acts with a short history of the development of contract rules in each tradition. It then identifies four perceived risks of pre-contractual liability that differ between these legal traditions. Finally, I attempt to show a quantifiable link between legal tradition and investment climate through a quantitative and qualitative analysis.

DEFINING THE PROBLEM

A. Nature of the Problem

The central question in this analysis is whether a country's legal tradition—that is, common or civil law—affects entrepreneurial activity in that country. Liability for assertions made during the contract negotiation process differ amongst common and civil law jurisdictions, affecting levels of risk for negotiating parties. For purposes of this analysis, I define negotiation risk as entering into negotiations for a potential contract at arms-length with one or more parties without any certainty about the outcome of those negotiations.

It is commonly understood that once two parties have formalized a contract, either through signatures or some related closing process (e.g., notarization), the parties take on a duty to perform, which in layman's terms refers to an obligation to abide by the commitments made in the agreement. Failure to comply with the terms of the agreement may lead to liability by the non-compliant or breaching party, which in turn may mean

¹⁹ La Porta, et al., *The Quality of Government*, 15 J. OF L, ECON., AND ORG. 222, 251–52 (1999) (explaining that French civil law countries have less efficient and more interventionist policies toward contracts than German or common law systems); Daron Acemoglu & Simon Johnson, *Unbundling Institutions*, 113 J. OF POL ECON. 949, 954 (2005) (arguing that contracting institutions affect investors but not necessarily the overall investment climate since investors have alternatives available).

²⁰ See generally Arthur L. Stinchcombe, *Social Structure and Organizations*, in HANDBOOK OF ORGANIZATIONS 142 (James G. March ed., 1965).

litigation or arbitration to resolve the dispute. The duty is what establishes legal liability for a party to a contract.²¹

Before that duty arises, however, there is a period in which the parties go through negotiation—sometimes simple, sometimes quite extensive and extending over many years.²² Agreements reached during this preliminary phase—often known as “gentleman’s agreements”²³—may give confidence to the parties that a legally binding commitment has been made. Indeed, in many cases, these early agreements result in the establishment of a formal contract that binds the parties. In many other cases, however, one or both of the parties will decide that a contract is not appropriate and will terminate negotiations. From the perspective of the common law, the outcome of the negotiations is immaterial—liability will only attach under contract law if a contract is in fact concluded.²⁴ This may not be the case under civil law rules.

It is important to note that during this pre-contractual period, parties may enter into other preliminary agreements. These can include non-disclosure agreements (NDA),²⁵ confidentiality agreements,²⁶ and letters of intent, for instance. The NDA and confidentiality agreements are meant to create an independent contract giving rise to a cause of action for activities external to the contract itself. The letter of intent,²⁷ however, speaks to the good faith negotiation of the contract. The latter is treated by courts almost without exception as a non-binding agreement to agree and

²¹ See *Lamoureux v. Burrillville Racing Ass’n*, 161 A.2d 213 (1960).

²² See, e.g., E. Allan Farnsworth, *Pre-contractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 221–23 (1987) (explaining the freedom of negotiation approach taken in U.S. contract negotiation processes).

²³ F. Willem Grosheide, *The Gentleman’s Agreement in Legal Theory and Modern Practice* 109, 113 (unpublished manuscript) (explaining that these agreements are made in the “shadow of the law” and that, though not often binding, may be used for interpretation of other commitments made between the parties), <https://dspace.library.uu.nl/bitstream/handle/1874/42822/b6.pdf>.

²⁴ Farnsworth, *supra* note 22, at 242–43 (discussing the approach of U.S. courts as aleatory and disinterested in the negotiation itself).

²⁵ See, e.g., Neva B. Jeffries, *Preliminary Negotiations or Binding Obligations? A Framework for Determining the Intent of the Parties*, 48 GONZ. L. REV. 1, 8 (2012) (explaining that an NDA is a binding agreement that is often utilized during contract negotiations in which disclosure of information about the negotiation itself could hinder the successful conclusion of a contract).

²⁶ See, e.g., Cathy Hwang, *Unbundled Bargains: Multi-Agreement Dealmaking in Complex Mergers and Acquisitions*, 164 U. PA. L. REV. 1403, 1410–11 (2016) (discussing the common use of confidentiality agreements in corporate takeover bids to prevent discussion of the existence of a negotiation or offer).

²⁷ Also known as a “commitment letter,” “memorandum of understanding,” or “term sheet.”

carries with it no legal remedy in the absence of bad faith.²⁸ The former agreements carry with them remedies but not for breach of the principal contract. For the purpose of this discussion, I limit my analysis to liability for the underlying contract only.

During this negotiation period, a party may take certain steps in anticipation of the conclusion of a contract with their counterparty. For instance, a party may secure financing from a lending institution, hire additional labor, or terminate negotiations with other potential partners. While none of these actions are mandated by the other party, they are a natural outgrowth of the negotiation. Each of these actions require a commitment of resources that would not have been expended but for the expectation of a contract at the end of the negotiation period. If the contract does not materialize, who should bear responsibility for covering the losses associated with the expenditure of these resources? To a common law lawyer, the answer may seem obvious—these are sunk costs that are not reimbursable. But to a civil law lawyer, the answer may be quite different.

PRE-CONTRACTUAL LIABILITY DEFINED

It is important at the outset of this discussion to define precisely what pre-contractual liability means.²⁹ For purposes of our discussion, pre-contractual liability refers to legal consequences and economic damages resulting from commitments made by one party during contract negotiations but before any contract is concluded.³⁰ Cases for pre-contractual liability can be based upon evidence gathered from documents exchanged during the negotiations, which may demonstrate party's intent toward a particular transaction.³¹ They express many of the likely covenants and conditions of the forthcoming contract without actually agreeing to any of those clauses or conditions. In the eyes of business professionals, these are binding commitments to negotiate a binding

²⁸ See, e.g., Farnsworth, *supra* note 22, at 252 (explaining that “[p]reliminary agreements, whatever their type, rarely raise questions under the classic rules of offer and acceptance.”).

²⁹ See *id.* at 223 (“The law of pre-contractual liability is relatively undeveloped, even on the grounds that are already recognized. This may be due in part to the considerable uncertainty that surrounds the measure of recovery under any of these grounds.”).

³⁰ See Grosheide, *supra* note 23, at 104 (defining pre-contractual agreements as any agreements “that tend to pave the way to an actual contract”).

³¹ See generally Alan Schwartz & Robert E. Scott, *Pre-Contractual Liability and Preliminary Agreements*, 120 HARV. L. REV. 662 (2007).

contract. In the eyes of legal professionals, they are dangerously ambiguous commitments that may or may not be enforceable in court.³²

Pre-contractual liability in common law systems is a curious thing. A contract by common law definition is a promise or set of promises that, when breached, is remediable in a court of law.³³ In a few cases, a court may decide that the parties had agreed to the majority of terms and intended to be bound by those terms even though a formal contract was not concluded.³⁴ In many others, only an agreement to agree was created, resulting in no liability for failure to go forward with a contract. Yet the line between the two is highly uncertain and perhaps nonexistent. In referring to letters of intent, the key pre-contractual document, the great E. Allan Farnsworth once quipped that “[i]t would be difficult to find a less predictable area of contract law.”³⁵

As a general matter, common law offers no recovery of resources spent on a failed contract negotiation. But if the loss results from a completed contract negotiation, that party will be able to pursue the standard contract breach remedy—expectation damages. The area in between a failed negotiation and a completed contract is a minefield for contract lawyers in common law courts. In an excellent article outlining the range of options for remedies in this gray area, Professors Alan Schwartz and Robert E. Scott explain that there are three potential outcomes of an incomplete negotiation: 1) if the negotiation never led to an agreement on material terms, no remedy is available; 2) if the negotiation led to agreement on all material terms and the parties intended to memorialize the agreement in the near future, a court will treat that as a contract and award expectation damages in the event of breach; or, 3) if the negotiation led to most terms being agreed upon but some left open for negotiation, the parties are required to negotiate in good faith but are not eligible for expectation damages yet; however, if a party negotiated in bad faith, they may be liable for reliance damages.³⁶

In contrast, civil law jurisdictions provide much more clarity and protection for victims of pre-contractual negotiation “breaches” by

³² J. Andrew Holten, *Letters of Intent in Corporate Negotiations: Using Hostage Exchanges and Legal Uncertainty to Promote Compliance*, 162 U. PENN L. REV. 1237, 1247 (2014).

³³ RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 1979).

³⁴ See, e.g., *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 788–89 (Tex. App. 1st 1987) (concluding that even an informal agreement can become binding if intent is shown, and explaining that whether the parties have agreed upon all “essential terms of [an] alleged contract” is one of the factors used to “determine whether the parties intended to be bound only by a formal, signed writing”).

³⁵ Farnsworth, *supra* note 22, at 259–60.

³⁶ Alan Schwartz & Robert E. Scott, *Precontractual Liability and Preliminary Agreements*, 120 Harv. L. Rev. 661, 664–65 (2007).

establishing predictable, statutory remedies. The French civil code defines a contract as “an agreement by which one or several persons bind themselves, towards one or several others, to transfer, to do or not to do something.”³⁷ Note the lack of reference to agreements remediable in court only. In addition to the basic duty of negotiating in good faith, which is applied in both common law and civil law jurisdictions, several doctrines in civil law provide explicit remedies for parties aggrieved by negotiations that did not result in reasonable outcomes. These remedies are built into the body of civil law that I will explain below.

The question this article explores is whether foreign investors face increased legal risk in cross-border transactions in either civil or common law systems, and whether this may deter investment. This requires asking whether there are any significant distinctions between common and civil law contract laws that would generate additional risk for potential investors; if so, whether those risks affect the overall investment climate; and how those risks can be mitigated. The next section explains the methodology used to conduct this mixed methods analysis.

PRE-CONTRACTUAL AGREEMENTS: AN OVERVIEW OF THE PROBLEM

According to the fictionalized version of the story, in 1961, entrepreneur Ray Kroc famously shook the hand of Dick McDonald after agreeing to pay McDonald and his brother \$2.7 million as an ownership buyout and agreeing to give a percentage of future profits in the McDonald’s franchise. The lump sum was paid, but the recurring profit checks were never provided despite the enormous success of the enterprise. Essentially, the original founders of the McDonald’s restaurant were written out of history with a single payment by Ray Kroc and a handshake.³⁸ McDonald’s revenues were near \$6 billion in 2017.³⁹

Handshakes and similar gestures are commonplace in the business community. Deals are often made away from the comforts of an attorney’s office, where a proper contract might be drawn-up. And in many cases, the handshake is followed-up with a formal contract or the performance of the agreement, both of which provide the legal authority to enforce the terms of the contract in court or arbitration. However, as any lawyer will tell his or her client, the gesture alone is not enough to create an actionable agreement.

³⁷ CODE CIVIL [C. CIV.] art. 1101 (Fr.).

³⁸ See David Brancaccio, *The True Origin Story Behind McDonald’s*, MARKETPLACE (Feb. 9, 2017, 6:07 AM), <https://www.marketplace.org/2017/02/09/business/ray-kroc-mcdonalds-fast-food>.

³⁹ See, e.g., *McDonald’s Serves Up Surging Sales and Profits*, BBC NEWS (Oct. 24, 2017), <https://www.bbc.com/news/business-41728541>.

[O]ne has to bear in mind that commercial men do not look at these things quite from the lawyer's point of view [Although a lawyer would consider an instrument to be worthless] a commercial man would regard the guarantee, perhaps furnished in the form of [a] letter, as having some value as underlining, as it were, the promise that had been undertaken.⁴⁰

In a famous English common law case, a U.S. distributor of carbon paper products, which were manufactured by an English firm, signed a document stating the following:⁴¹

This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement and shall not be subject to legal jurisdiction in the Law Courts . . . but it is only a definite expression and record of the purpose and intention of the three parties concerned, to which they each honourably pledge themselves with the fullest confidence—based upon past business with each other—that it will be carried through by each of the three parties with mutual loyalty and friendly co-operation.⁴²

The English company (Crompton) terminated the agreement without notice and refused to execute orders placed prior to termination. The American plaintiffs brought suit for breach of contract and non-delivery of goods. The English court found no binding contract on the basis of the language above. In his dissenting opinion, Judge Atkin provided useful language as to why such language would not be binding:

To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly. Such an intention ordinarily will be inferred when parties enter into an agreement which in other respects conforms to the rules of law as to the formation of contracts.⁴³

⁴⁰ Larry A. DiMatteo, *The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings*, 22 YALE J. INT'L L. 111, 116 (1997).

⁴¹ *Rose and Frank Co. v. J.R. Crompton & Bros. Ltd.* [1924] UKLH 2, [1925] AC 445 (HL) (appeal taken from Eng.).

⁴² *Id.*

⁴³ *Rose and Frank Co. v. J.R. Crompton & Bros. Ltd.* [1923] 2 L. Rep. Incorporated Council L. Rep., KBD 261, [293] (appeal taken from Eng.).

The judge went on to explain that language suggesting the desire to formalize in the future the terms agreed to preliminarily also would negate the enforceability of those preliminary terms:

I might add that a common instance of effect being given in law to the express intention of the parties not to be bound in law is to be found in cases where parties agree to all the necessary terms of an agreement for purchase and sale, but subject to a contract being drawn up. The words of the preliminary agreement in other respects may be apt and sufficient to constitute an open contract, but if the parties in so agreeing make it plain that they do not intend to be bound except by some subsequent document, they remain unbound though no further negotiation be contemplated. Either side is free to abandon the agreement and to refuse to assent to any legal obligation; when the parties are bound they are bound by virtue only of the subsequent document.⁴⁴

Other cases have similarly held that language of non-enforceability generally negates even formally-drafted language in an agreement.⁴⁵ The value of any preliminary promise or assurance is based largely upon its degree of detail: The detail and strength of the language is positively correlated with reliance from the other party.

One form of assurance commonly used in business practice is the comfort letter. “An estimated ninety-five percent of all comfort letters are issued by a parent company to obtain financing for a subsidiary.” Consider the case of *Chemco Leasing S.p.A. v. Rediffusion Pic.*, in which Justice Staughton described comfort letters as a “gentlemen’s agreement” whereby the business parties are interested in concluding the agreement even though certain particularities have not yet been ironed out.⁴⁶ That manifest intent was sufficient to prove the existence of a binding contract.

In that case, Chemco financed a lease for an electronics manufacturer partly on the basis of a comfort letter issued by a company (CMC) that owned 99.1% of that manufacturer’s shares and stating that those shares would not be sold without prior notice to Chemco. Those shares were ultimately sold and Chemco later objected to the new shareholders. In finding that the comfort letter was actionable, Judge Staughton stated:

⁴⁴ *Id.* at 293–94.

⁴⁵ See *Stanich v. Hisson Grp., Inc.*, No. 2:09-cv-0143, 2010 U.S. Dist. LEXIS 98709 (S.D. Ohio Sept. 20, 2010) (holding an arbitration agreement, which did not require the employer to provide advance notice of modification was unenforceable, because it constituted an illusory promise and lacked mutuality of obligation).

⁴⁶ DiMatteo, *supra* note 40, at 115.

When two businessmen wish to conclude a bargain but find that on some particular aspect of it they cannot agree, . . . it is not uncommon for them to adopt language of deliberate equivocation, so that the contract may be signed and their main objective achieved. No doubt they console themselves with the thought that all will go well, and that the terms in question will never come into operation or encounter scrutiny; but if all does not go well, it will be for the courts or arbitrators to decide what those terms mean. In such a case it is more than somewhat artificial for a judge to go through the process, prescribed by law, of ascertaining the common intention of the parties from the terms of the document and the surrounding circumstances; the common intention was in reality that the terms should mean what a judge or arbitrator should decide that they mean, subject always to the views of any higher tribunal.⁴⁷

As a general matter, comfort letters and similar preliminary statements made by a party during a contract negotiation are not enforceable in common law jurisdictions.⁴⁸ However, as the *Chemco* case above demonstrates, there are exceptions to this rule, such as in the case where a promise is made and relied upon by the other party to their detriment. This is similar to the doctrine of *contra proferentum*, in which any ambiguity in a document is interpreted against the draftsman.⁴⁹ In this case, the promises are interpreted against the party that made them.

While the common law system requires commercial agreements to meet certain standards in order to constitute enforceable promises, some civil law systems apply a default rule: a commercial agreement is binding if it contains language that an objective person would consider to be a promise.⁵⁰ A French scholar describes comfort letters as obligations *de faire*, meaning a commitment to perform.⁵¹ In common law, much more importance is placed upon the precise words used than on the objective interpretation of the language.

⁴⁷ Kleinwort Benson Ltd. v. Malaysia Mining Corp. Berhad [1988] 1 Lloyd's L. Rep. 556 (QB) [560-61] (Eng.).

⁴⁸ See DiMatteo, *supra* note 40, at 117 (explaining that the Queen's Bench in England has previously held that an unsigned comfort letter does not satisfy the statute of frauds, and thus, is unenforceable).

⁴⁹ See SAMUEL WILLISTON, THE LAW OF CONTRACTS 1161 (1st ed. 1920).

⁵⁰ See Léon Proscour, *France*, 6 INT'L BUS. LAW. 302 (1978) (explaining under French law letters of responsibility are considered binding "because in the commercial world the creation of a meaningless instrument or document is unthinkable").

⁵¹ *Id.*

The difference between “we agree” and “we pledge” can mean the difference between a binding and a non-binding promise in common law. U.S. courts have tended to place great weight upon the use or nonuse of contractual nomenclature. If a comfort letter issuer avoids the operative words of contract or guaranty, then she will probably avoid contractual liability. However, the use of operative phrases such as ‘we agree,’ ‘we undertake,’ or ‘we promise’ generally will lead U.S. courts to find contractual intent.⁵²

Take for instance the case of *Mutual Export Corp. v. Westpac Banking Corp.*, in which a bank that was unable to finalize its letter of credit in time for the closing of a deal issued a letter, which stated as follows:

The Bank has *approved* at the request of Refrigerated Express Lines (A/Asia) Pty Ltd, the establishment of an Irrevocable Credit for USD \$500,000 in favour of Mutual Export Corporation.

The Bank hereby *undertakes* to issue the credit in the *draft form provided by your company, or as mutually agreed upon* between your company and the Bank.⁵³

Following the demise of the agreement two years later, the plaintiff attempted to draw down on the letter of credit and found that it was unable to do so due to an incorrectly notated date in that letter.⁵⁴ They brought suit and the defendant bank argued that the language above made the letter unenforceable.

Applying Australian contract law, the New York court emphasized that the language used in the letter stipulating that the bank *undertakes* its obligation to issue the letter of credit, “while not thus mystically transforming it into a contract, nevertheless reinforces our concluding that a contract was intended.”⁵⁵ They dismissed the bank’s argument that the letter was not a formal document; however, the court emphasized that the parties all agreed “that the letter of credit was in place right up until [the] plaintiff attempted to draw on it.”⁵⁶ The words used documents indicating intent significantly impact the ultimate interpretation by the court.

⁵² DiMatteo, *supra* note 40, at 118 (footnote omitted).

⁵³ *Mut. Exp. Corp. v. Westpac Banking Corp.*, 789 F. Supp. 1279, 1281 (S.D.N.Y. 1992).

⁵⁴ *Id.* at 1284.

⁵⁵ *Id.* at 1286.

⁵⁶ *Id.* at 1288.

REFRESHER ON CIVIL AND COMMON LAW CONTRACT RULES

First and foremost, as this is a comparative legal analysis article, it is important to distinguish between contractual liability in general across common and civil law jurisdictions. As a reminder, common law jurisdictions include those countries that, usually due to past colonization, follow the principles of British common law. This legal tradition emphasizes judicial interpretation of individual cases above legislative directives. Civil law jurisdictions constitute most of the remaining systems.⁵⁷ These countries follow some form of code-based law (usually French or German) and derive judicial decisions through application of a broad array of legislative directives.

In another publication, I explained civil and common law contracts share many common elements.⁵⁸ In both systems, an effective contract requires a valid offer, acceptance, and mutual agreement on the nature of the contract. However, there are important differences between contracts in these systems as well, such as the requirement for consideration in common law contracts and the formalities required for many contracts within civil law jurisdictions.⁵⁹ ⁶⁰ These differences can result in disputes for cross-border transactions as parties may be unaware of the distinct requirements for contract formation and thus unprepared for resulting litigation over the effect of their terms.⁶¹

For the purposes of this article, my examination will focus on differences in interpretation and effect across civil and common law traditions related to a court's willingness to impose liability for party actions taken prior to closing a deal. More precisely, whether legal traditions treat the negotiation process differently with respect to attaching liability to a party's statements and, if so, what impact does this have on the entrepreneurial environment in that jurisdiction. The analysis begins with clarifying the nature and importance of the problem.

B. Distinctions between Legal Traditions

Common and civil law are two branches of the same tree. However, their differences with respect to commercial law are significant.⁶² Civil law emerged in continental Europe out of the precepts of Roman Law and, in particular, the Justinian Code. Civil law itself, which was established as

⁵⁷ Note that there are a number of theocratic countries throughout the Middle East and Africa, as well as mixed systems of law in countries such as South Africa.

⁵⁸ See Kevin J. Fandl, *Cross-border Commercial Contracts and the Ongoing Need for Consideration*, 34 BERK. J. OF INT'L L. 1 (2015).

⁵⁹ *Id.* at 9–18.

⁶⁰ *Id.* at 22.

⁶¹ *Id.* at 6, 53.

⁶² *Id.* at 6.

the law of the people, was shaped around the establishment of written principles meant to guide the actions of the governed as well as the government. The most far-reaching and comprehensive code established on the continent in this vein was the Napoleonic Code, which emerged in 1804.⁶³ That Code served as the basis for many other European Codes, both on the continent and among the former European colonies.⁶⁴

Common law also has its roots in Roman law.⁶⁵ However, England, where common law emerged, chose not to follow the continental model of establishing written codes to guide practice.⁶⁶ Rather, England followed a model that empowered magistrates to make determinations on a case-by-case basis, with the understanding that many of those decisions would establish a body of precedent to bind judges in similar cases in the future.⁶⁷ This model was far more adaptable and responsive to issues of the day than was civil law, which required the work of legislators to change the law.

1. Common Law: A Short History

Common law is rooted in the concept of freedom of contract.⁶⁸ Parties are free to enter into contracts for any legal purpose that suits them, and courts loath to involve themselves in those private transactions. In an 1890 case in the California Supreme Court, Judge Paterson said, “the greatest liberty of making contracts is essential to the business interests of the country. In general, the parties must look out for themselves.”⁶⁹

Common law was established in England following the Norman Conquest of 1066, though some elements of what we today associate with

⁶³ For an interesting explanation of the value of the Code in civil law, see Guy Canivet, *French Civil Law Between Past and Revival*, 51 LOY. L. REV. 39 (2005).

⁶⁴ Kensie Kim, *Mixed Systems in Legal Origins Analysis*, 83 S. CAL. L. REV. 693, 718 (2010) (asserting that most civil law countries were modeled on the Napoleonic Code, with the notable exception of countries of Roman-Dutch origin).

⁶⁵ See generally T.F.T. Plucknett, *The Relations Between Roman Law and English Common Law down to the Sixteenth Century: A General Survey*, 3 U. OF TORONTO L.J. 24 (1939).

⁶⁶ See Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435, 471 (2000).

⁶⁷ See Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651 (1994).

⁶⁸ See, e.g., Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1621 (2003) (contending that the flexibility on common law contracts encouraged economic efficiency and more freedom to contract among parties); Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94 (2000) (debating the role of the judiciary in protecting or preventing freedom in the contracting process).

⁶⁹ *Colton v. Stanford*, 82 Cal. 351, 398 (1890).

common law existed prior to this time.⁷⁰ Magistrates traveled around circuits throughout England to hold court and they carried the decisions of other courts with them. Decisions that were considered local or customary were largely ignored, but those that appeared “common” among different jurisdictions were said to establish precedent and were applied in subsequent cases.

King Henry II officially institutionalized the concept of common law in 1154.⁷¹ He sent judges from the King’s Court to hear disputes around the country, and they would reconvene to share decisions and establish a written record of those decisions. Eventually, the prior system of allowing local laws and customs to govern local disputes fell away, and a national system of *stare decisis* was created.

One of the most useful facets of the common law, with respect to business, is its adaptability. Unlike civil law, which is constrained by the will of the legislature and the ability of legislators to quickly react to practical events, the common law need only take a single instance of perceived injustice to a court to secure a decision that will have an immediate impact on practice. Justice Brandeis famously quipped, “in most matters it is more important that the applicable rule of law be settled than that it be settled right.”⁷² Forming a contract in a common law jurisdiction requires the satisfaction of certain elements. However, in contrast to civil law jurisdictions (discussed below), common law courts are more willing to find a contract in the absence of certain formalities.

“The common law, as commonly understood, is notoriously ineffective in protecting those who rely to their detriment in anticipation of a contract which fails to materialize.”⁷³ Consider the famous common law case of *Embry v. McKittrick Dry Goods Company*.⁷⁴ There, an employee who had been with the company for some years reached the end of his employment contract period. He approached the owner of the company and asked whether he should look for other work or stay on under

⁷⁰ See, e.g., JOHN HUDSON, *THE FORMATION OF THE ENGLISH COMMON LAW: LAW AND SOCIETY IN ENGLAND FROM THE NORMAN CONQUEST TO MAGNA CARTA* 20–21 (1996); see also JOHN HUDSON, *THE FORMATION OF THE ENGLISH COMMON LAW: LAW AND SOCIETY IN ENGLAND FROM THE NORMAN CONQUEST TO MAGNA CARTA* 20–21 (1996); R.C. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* 33 (2d ed. 1988).

⁷¹ See, e.g., HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 457 (1983); PAUL BRAND, “*Multis Vigiliis Excogitatam et Inventam*”: *Henry II and the Creation of the English Common Law*, in *THE MAKING OF THE COMMON LAW* 77, 78 (1992).

⁷² *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

⁷³ Ben McFarlane, *The Problem of Pre-contractual Reliance: Three Ways to a Third Way* 2 (Oct. 11, 2006) (unpublished manuscript) (on file with New York School of Law).

⁷⁴ *Embry v. Hargadine, McKittrick Dry Goods Co.*, 105 S.W. 777 (1907).

a new contract. The owner, who apparently was too busy at the time to be bothered with formalities, told Embry: "Go ahead, you're all right. Get your men out, and don't let that worry you." Embry continued working without a formal contract. Three months later, he was discharged, and he brought suit. The court concluded that a contract exists when there is an expressed manifestation of intent to be bound by a contract: "The inner intention of parties to a conversation subsequently alleged to create a contract cannot either make a contract of what transpired, or prevent one from arising, if the words used were sufficient to constitute a contract."⁷⁵

The outward expression of party intent is generally what creates liability for contract in common law jurisdictions.⁷⁶ However, common law courts are willing to find contractual liability, not necessarily pre-contractual liability, for statements or actions taken prior to the confirmatory language. Much of the distinction between these two devices relates to the common law court's role in the enforcement of promises.

As noted above, freedom of contract is at the heart of common law contracts. The *laissez-faire* approach to economic policy introduced in the late-18th century spilled over into the field of contract law, leaving government and the regulatory system largely out of private contract matters.⁷⁷ Beginning with early U.S. cases, such as *Seixas v. Woods* in 1804,⁷⁸ U.S. courts have defaulted to a rule of *caveat emptor* ("buyer beware") in contract transactions, though this trend is changing.⁷⁹ In the *Seixas* case, a buyer was guaranteed a certain type of wood in a contract, but he failed to conduct an inspection of that wood at the time of the exchange.⁸⁰ Later, after realizing that he was given the incorrect type of

⁷⁵ *Id.* at 779.

⁷⁶ See, e.g., *Lucy v. Zehmer*, 84 S.E. 2d 516 (1954); see also *Hotchkiss v. Nat'l City Bank of New York*, 200 Fed. 287 (S.D.N.Y. 1911). see also, *Texaco Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 788-89 (1987), in which the court found that:

Several factors have been articulated to help determine whether the parties intended to be bound only by a formal, signed writing: (1) whether a party expressly reserved the right to be bound only when a written agreement is signed; (2) whether there was any partial performance by one party that the party disclaiming the contract accepted; (3) whether all essential terms of the alleged contract had been agreed upon; and (4) whether the complexity or magnitude of the transaction was such that a formal, executed writing would normally be expected . . .

⁷⁷ See Carolyn Edwards, *Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues*, 77 UMKC L. REV. 647, 652 (2009) (explaining that courts in the early 19th century sought to preserve market growth by protecting freedom of contract).

⁷⁸ *Seixas v. Woods*, 2 Cai. R. 48 (N.Y. Sup. Ct. 1804).

⁷⁹ See Nicole W. Palmieri, *Good Faith Disclosures Required During Pre-Contractual Negotiations*, 24 SETON HALL L. REV. 70 (1993) (arguing that courts are increasingly looking to principles of good faith and reliance in commercial contracts).

⁸⁰ *Seixas*, 2 Cai. R. at 54.

wood, he sued, but the court refused to assist him and placed the burden on the parties to contract to ensure compliance with the terms of the deal.⁸¹

Undoubtedly, the concept of *caveat emptor* has significantly evolved in the American common law system.⁸² Today, many types of contracts require parties to disclose certain information during a negotiation regardless of whether the other party requests it.⁸³ These situations include when a party negligently misrepresents a material fact during a contract negotiation;⁸⁴ dangerous conditions not discoverable by a buyer in a property transaction;⁸⁵ or where a party with knowledge is aware that a buyer has false information to a transaction and the seller takes no steps to correct the mistake.⁸⁶ However, in the absence of an agreement to disclose and these narrow areas of law, most other contractual transactions bear no duty of candor in common law contracts, leaving the parties largely on their own to conduct their due diligence.⁸⁷

During the contract negotiation process in common law, the parties are most often treated as uncommitted and at-risk for any loss that might occur from failure to conclude a contract.⁸⁸ “Common law judges have always taken what I have called an aleatory view of negotiations; a party that enters negotiations hoping to gain from a resulting contract bears the risk of any loss that would be incurred if the other party breaks off the negotiations.”⁸⁹ Outside the case of estoppel or misrepresentation, a common law “party to pre-contractual negotiations, may break off the

⁸¹ See *Colton v. Stanford*, 82 Cal. 351, 398 (1890) (“[T]he greatest liberty of making contracts is essential to the business interests of the country. In general, the parties must look out for themselves.”); *Swinton v. Whitinsville Sav. Bank*, 42 N.E. 2d 808 (1942) (“A vendor of real property has no duty to disclose to a prospective purchaser the fact of a latent termite condition in the premises.”). *But see*, *Reed v. King*, 193 Cal. Rptr. 130 (1983) (limiting the doctrine of *caveat emptor* in certain real property transactions in California).

⁸² See Howard Johnson, *Caveat Venditor (Let the Seller Beware)*, 27 MANAGERIAL L. 1, 2–3 (1985) (explaining the shift toward consumer protection taking place in the mid-20th century).

⁸³ See Palmieri, *supra* note 79.

⁸⁴ See *Asleson v. West Branch Land Co.*, 311 N.W.2d 533, 535 (N.D. 1981)

⁸⁵ *State v. Brooks*, 658 A.2d 22, 24–26 (Vt. 1995) (finding a seller liable where he failed to disclose a defect in the property that he was aware was dangerous and that ultimately killed the buyer).

⁸⁶ RESTATEMENT (SECOND) OF CONTRACTS § 161 (AM. LAW INST. 1981).

⁸⁷ See William B. Goldfarb, *Fraud and Nondisclosure in the Vendor-Purchaser Relation*, 8 WEST. RES. L. REV. 5, 13 (1956); W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 106, at 737 (5th ed. 1984).

⁸⁸ See Juliet P. Kostirtsky, *Uncertainty, Reliance, Preliminary Negotiations and the Holdup Problem*, 61 SMU L. REV. 1377, 1378 (2008) (explaining the problem of uncertainty in contract negotiation).

⁸⁹ E. Allan Farnsworth, *Duties of Good Faith and Fair Dealing Under the UNIDROIT Principles, Relevant International Conventions, and National Laws*, 3 TUL. J. INT’L & COMP. L. 47, 57 (1995).

negotiations at any time and for any reason, including no reason at all, and face no liability.”⁹⁰ This is not the case in civil law jurisdictions.

2. Civil Law: A Short History

Though there are many variations of civil law, this section will focus on the most widespread, which is the Napoleonic Code.⁹¹ Book III of the Napoleonic Code addresses the law of commercial obligations, which will be the focus of this analysis.⁹²

Civil law is based upon the theory that the state should have a key role to play in the administration of justice and the determination of appropriate public policy. Legislators decide what the law should be, and government administrators (regulators) apply the law.⁹³ Though far less adaptable than the common law, civil law boasts a great deal of predictability and transparency.⁹⁴ The law is not decided through interpretation in the courts after it is enacted—it is decided in advance by the legislature.

Predictability is no doubt a good feature for commercial transactions.⁹⁵ Knowing what the law is can lend clarity to a transaction that might be rife with business risk. Civil law, in this sense, can help mitigate some transactional risk by eliminating the third-party interpretation associated with the courts in common law jurisdictions. However, predictability comes with potential risk for parties that prefer to consider multiple options for their contractual endeavors before settling on a final choice. As we will see below, civil law is less forgiving of parties that make promises without following through on them.

French law has similar contract formation requirements to those of common law jurisdictions.⁹⁶ Clear and certain intent to be bound by the

⁹⁰ R.J.P. Kottentagen, *From Freedom of Contract to Forcing Parties to Agreement: On the Consequences of Breaking off Negotiations in Different Legal Systems*, 12 IUS GENTIUM, J. OF THE U. OF BALT. CTR. FOR INT’L AND COMP. L. 58, 73 (2006).

⁹¹ Two key variations of the civil law are the Germanic Code and the Scandinavian Code; however, differences between common and civil law are far more substantial than differences among the variations of civil law.

⁹² CODE CIVIL [C. CIV.] art. (Fr.).

⁹³ See Max Rheinstein, *Common Law and Civil Law: An Elementary Comparison*, 22 REVISTA JURIDICA DE LA U. DE PUERTO RICO 90 (1952).

⁹⁴ See Ken Adams, *Civil-Law Drafting Compared to Common-Law Drafting* (Nov. 24, 2006), <http://www.adamsdrafting.com/civil-law-and-common-law-drafting/> (defining civil law as more predictable given the number of statutes on contracts).

⁹⁵ See, e.g., Stefanie A. Lindquist and Frank C. Cross, *Stability, Predictability and the Rule of Law: Stare Decisis as a Reciprocity Norm*, U. TEXAS WORKING PAPER, <https://law.utexas.edu/conferences/measuring/The%20Papers/Rule%20of%20Law%20Conference.crosslindquist.pdf>. But see, Ofer Raban, *The Fallacy of Legal Certainty: Why Vague Legal Standards may be Better for Capitalism and Liberalism*, 19 PUB. INTEREST L. J. 175 (2010).

⁹⁶ CODE CIVIL [C. CIV.] art. 1112-1 (Fr.).

parties' stated terms as well as stipulation of essential contract terms are required to form a valid contract.⁹⁷ A significant difference exists between the two systems with respect to the need for consideration.⁹⁸ In civil law, the contract formation process is clear and defined, with certain elements, depending on the type of contract, required by law. These formalities make the line between a potential contract and an actual contract relatively thin. As noted in the previous section, in the common law, the lack of such formalities led to the need for consideration—valuable exchange—to prove that the parties meant to actually form a contract.⁹⁹

PERCEIVED LEGAL RISKS FOR ENTREPRENEURS

Pre-contractual liability exists when a party engaged in the negotiation of a contract faces monetary or equitable damages for actions that took place prior to the formation of the contract, regardless of whether the contract was executed or not. As discussed above, pre-contractual liability can pose a significant risk to parties that might be interested in investigating avenues for the successful conclusion of a contract but ultimately choose to go a different way. The more predictable this risk is, the less likely it will pose a barrier to the potential negotiation process.¹⁰⁰

This section discusses four of the most common areas of legal risk for pre-contractual acts: *lesion*, Good Faith, Duty to Disclose and Reliance. What will become clear from this discussion is that all remedies across both legal systems are highly limited to specific circumstances; however, what will also be clear is the variety of mechanisms available in civil law jurisdictions and the dearth of such options in common law jurisdictions. We will begin with the doctrine of *lesion*.

1. Civil Equity: The Doctrine of Lesion

One of the significant distinctions between common law and civil law is the ability of a common law court to create its own equitable remedies for a particular case. This practice inserts a great deal of unpredictability into any commercial transaction and poses a significant legal and financial

⁹⁷ PAULA GILIKER, PRE-CONTRACTUAL LIABILITY IN ENGLISH AND FRENCH LAW 3 (Kluwer Law International, 2002) (“le contrat est une convention par laquelle une ou plusieurs personnes s’obligent, envers une ou plusieurs autres, à donner, à faire ou à ne pas faire quelque chose.” (“a contract is a convention which binds one or more persons, towards another or several others, to give, to do, or not to do something.”))

⁹⁸ See Fandl, *supra* note 58, at 11–12 (explaining the lack of a requirement for consideration in civil law contracts).

⁹⁹ Fandl, *supra* note 58 (outlining the history of the need for consideration in common law contracts).

¹⁰⁰ Kostirsky, *supra* note 88.

risk to parties. In most instances, civil law commercial transactions avoid this risk.¹⁰¹ However, there are a few established equitable remedies in civil law that, while not unpredictable, do provide parties with potentially unexpected results.

Civil law is more likely to impose liability on parties earlier in the negotiation process than common law.¹⁰² This can mean pre-contractual documents, such as comfort letters, are used as evidence to bind parties in the event of a dispute over final contract terms or execution.¹⁰³ One of the public policy reasons for this increased willingness to make parties liable for their pre-contractual assertions is the strong protections that statutes have historically provided for consumers and parties in less powerful bargaining positions.¹⁰⁴ The doctrine of *lesion* is one of the most significant examples of this policy.¹⁰⁵

French law favors enforcement. To the French, “the creation [in the commercial world] of a meaningless instrument is unthinkable.”¹⁰⁶ Part of the reason for the civil law tilt toward enforcing pre-contractual promises is the judicial examination of party intent. “Article 1156 dictates that the jurist seek ‘the common intention of the contracting parties rather than stop at the *mere literal sense of language*.’”¹⁰⁷

Lesion is the civil law concept that originally allowed a party to void a contract in which they would receive less than half the value of the property to be transferred to them.¹⁰⁸ The goal behind the original concept, known as *lasesio enormis*, was to protect landowners from being exploited by wealthier landowners.¹⁰⁹ The concept grew from application to

¹⁰¹ Changes to commercial transaction rules in civil law countries are made by legislation, not by judicial decree. *See, e.g., Changes to French Contract Law are Now in Effect: Are you Prepared?*, SQUIRE PATTON BOGGS, <https://www.squirepattonboggs.com/~media/files/insights/publications/2016/10/changes-to-french-contract-law-are-now-in-effect-are-you-prepared/24784changestofrenchcontractlawalert.pdf> (last visited Feb. 10, 2019) (describing the new French law on contracts, which includes the equitable remedy of specific performance).

¹⁰² DiMatteo, *supra* note 40, at 126.

¹⁰³ *Id.*

¹⁰⁴ *See* Gabriela Gheorgiu, et. al, *Consumer Protection in Relation with the European Business Environment*, 11 EUROPEAN SCI. J. 112, 113 (2015) (describing the European consumer protection environment as necessary to insulate consumers from bad acts of businesses).

¹⁰⁵ *See* LA Civ. Code 2663 (2010).

¹⁰⁶ DiMatteo, *supra* note 40, at 124.

¹⁰⁷ *Id.* at 125.

¹⁰⁸ Saül Litvinoff, *Vices of Consent, Error, Fraud, Duress, and an Epilogue on Lesion*, 50 LA L. REV. 1, 6 (1989).

¹⁰⁹ Christopher K. Odinet, *Commerce, Commonality, and Contract Law: Legal Reform in a Mixed Jurisdiction*, 75 LA. L. REV. 741, 777 (2015).

immovable property to movable property during early European times as a concept of “commutative justice.”¹¹⁰

Originating in the Middle Ages, the notion of inequality of consideration is now codified in article 1647 of the French Civil Code: ‘If the price of an immovable object is inadequate by more than *seven-twelfths*, the seller has the right to demand rescission of the sale.’ This is true even if the seller had renounced her right to rescission in writing. The right of rescission gives the purchaser two options: to return the item or to pay ‘the balance of the *just price*.’ Unlike the just price theories of the Middle Ages, the purchaser does not have a right of rescission if she has paid more than one and seven-twelfths the item’s value. Thus, under European law, a bid or offer letter to purchase at a below-market price may be subject to rescission or reformation.¹¹¹

By the time of Napoleon, great consternation over the expanded lesion concept had arisen within the business community. Valuing movable property and thus determining when the amount was less than half of that value became a subject of dispute.¹¹² When Napoleon issued his Code in 1804, he included the original lesion concept, which allowed a remedy for a party that received less than half of the value of immovable property only.¹¹³ This is the same concept that applies in most civil law countries today; however, no such concept exists in common law.¹¹⁴

2. Good Faith

[Good faith is] simply a rechristening of fundamental principles of contract law.¹¹⁵

Good faith . . . is best understood as an ‘excluder’—it is a phrase which has no general meaning or meanings of its

¹¹⁰ See Gerald J. Postema, *Risks, Wrongs, and Responsibility: Coleman’s Liberal Theory of Commutative Justice*, 103 YALE L. J. 861, 862 (1993) (citing 37 Thomas Aquinas, SUMMA THEOLOGIAE 87–101 (1975); see also Odinet, *supra* note 109, at 777.

¹¹¹ DiMatteo, *supra* note 40, at 112.

¹¹² Odinet, *supra* note 109, at 777–78.

¹¹³ CODE CIVIL [C. CIV.] art. (Fr.).

¹¹⁴ However, as a mixed legal system, lesion is applied in Louisiana. See, e.g., *Girault v. Feucht*, 120 La. 1070 (1908), *Pierce v. Roussel*, 227 La. 438 (1955); *Harruff v. King*, 139 So. 3d 1062 (2014).

¹¹⁵ *Tymshare Inc. v. Covell*, 727 F.2d 1145 (D.C. Cir. 1984).

own, but which serves to exclude many heterogeneous forms of bad faith.¹¹⁶

In both common and civil law, we often discuss the concept of good faith.¹¹⁷ This phrase gives us comfort that, if a party undermines the negotiation, we will have some sort of remedy at law. Yet the results of such cases widely vary depending on whether it is in a common or civil law jurisdiction.

Good faith is an amorphous concept that has been applied in both civil and common law jurisdictions to circumstances in which the law is unable or unwilling to provide a remedy, yet the interest of justice demands one. It is associated with concepts such as justice, fairness, and honesty in dealing.¹¹⁸ In the case of pre-contractual liability, good faith can refer to situations in which parties were held liable for their statements made during the negotiation process that created expectations by the other party.

It is important to note at the outset of our good faith discussion that a significant difference exists between good faith in the negotiation process and good faith in the performance of a contract. The latter is required in both common and civil law jurisdictions; however, the former is required only in civil law.¹¹⁹

a. Good Faith in the Civil Law

The principle of good faith in performance originated in Roman law.¹²⁰ This principle was subsequently adopted by the business community, the *lex mercatoria*, to facilitate compliance with contractual promises made between parties.¹²¹ Modern civil law codifies the concept of *bona fides* (good faith) in their respective codes.¹²²

¹¹⁶ Robert R. Summers, “Good Faith” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, VA. L. REV. 195, 196 (1968).

¹¹⁷ See *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.*, 47 Cal. App. 4th 464, 482 (1996) (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”); *Aiton Australia Pty. Ltd. v Transfield Pty. Ltd.* (1999) 153 F.L.R. 236, 258 (“It appears to be commonsense that as an obligation to act in ‘good faith’ may, in principle, be legally recognised as an implied or imputed obligation.”).

¹¹⁸ See Menno van der Veen & Willem K. Korthals Altes, *Strategic Urban Projects in Amsterdam and New York: Incomplete Contracts and Good Faith in Different Legal Systems*, 46 J. OF URB. STUD. 947, 951 (2009).

¹¹⁹ See Gregory J. Marsden & George J. Siedel, *The Duty to Negotiate in Good Faith: Are BATNA Strategies Legal?*, 14 BERKELEY BUS. L.J. 127, 135 (2017).

¹²⁰ Max Radin, *Fundamental Concepts of the Roman Law*, 12 CAL. L. REV. 481, 494 (1924).

¹²¹ Richard E. Speidel, *The “Duty” of Good Faith in Contract Performance and Enforcement*, 46 J. OF LEGAL EDUC. 537 (1996).

¹²² See, e.g., BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 242 (Ger.); CODE CIVIL [C. CIV.] art. 1134-35 (Fr.).

The concept of good faith in civil law is broadly interpreted:

The difference between civil law and common . . . is that the latter system accepts that good faith is not only the opposite of bad faith and a principle of honesty; it is also an independent legal category, which can be used to create rules. The . . . Dutch good faith principle encourages parties to consider each other's interests, even before a contract is signed.¹²³

The broad civil law interpretation—applying good faith to the negotiation as well as the performance of contracts—stands in stark contrast to the narrower and limited common law version, discussed below.

Pre-contractual liability in civil law can be traced back to Jhering, the German scholar, in 1865.¹²⁴ Jhering put together the doctrine of *culpa in contrahendo*, or fault in negotiating.¹²⁵ He contended that there are many circumstances in German case law in which a party, prior to formation of a contract, was negatively impacted because of the “blameworthy” conduct of the other party to the negotiation.¹²⁶ This blameworthy conduct included a party enticing another party toward a contract with objective knowledge of an impossibility to its formation. It also included a buyer who inadvertently orders 100 widgets rather than the 10 they intended and would not be liable to reimburse the seller for the transport costs for return of the excess widgets.¹²⁷

Jhering was referring to the concept of bad faith in negotiating and believed that a remedy should exist in civil law to account for this inequity. Subsequent modifications to the German civil code facilitated a resolution by imposing the concept of reliance on negotiating parties.¹²⁸ Following these modifications to the civil code, parties are able to recover in a number of pre-contractual cases: when a party is injured upon entering a store or restaurant; when a party expends resources to visit a house for sale despite the seller having already sold it (and not disclosing that fact); or a party with a duty to disclose giving erroneous information.¹²⁹

¹²³ See Van der Veen & Korthals, *supra* note 118, at 951.

¹²⁴ Jonathan Cardenas, *Deal Jumping in Cross-Border Merger & Acquisition Negotiations: A Comparative Analysis of Pre-Contractual Liability Under French, German, United Kingdom and United States Law*, 963–64 (2013).

¹²⁵ See Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401, 402 (1964).

¹²⁶ *Id.*

¹²⁷ *Id.* at 402–03.

¹²⁸ See BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], §§ 122, 149, 179, 307, 309, 463, 523 para. 2, 524, 500, 663, 694 (Ger.).

¹²⁹ Kessler & Fine, *supra* note 125, at 404–05.

It is important to note that the injured party in these cases is not entitled to expectation damages, because it would presuppose the existence of a contract. Rather, the injured party may seek reliance damages amounting to the extent of their loss resulting from actions taken in reliance on the promises of the blameworthy party.

The requirement to negotiate a contract in good faith exists throughout European civil codes. The oldest instance of this requirement is in the Italian civil code. The commentary to that section of the code stipulates parties must negotiate, “always bearing in mind the purpose that the contract is intended to satisfy, the harmony of the interests of the parties, and the superior interests of the nation requiring productive cooperation.”¹³⁰ A recent review of Italian case law applying this principle of good faith in cases of pre-contractual liability explains how this concept works in practice:

Italian case law now universally acknowledges that the notions of good faith and fairness are expressions of the general principle of social solidarity recognized by the Italian Constitution, and that they refer to specific obligations that apply both during contract negotiations and during the performance of contracts. These obligations are in addition to any other contractual duty already binding on the parties; in the event of their infringement, the aggrieved party is entitled to claim damages. It is also generally accepted that public policy imposes the requirement of good faith in all dealings (Art 1175 of the Civil Code) and during the pre-contractual stage (Art 1337 of the Civil Code).¹³¹

Pre-contractual liability in Italy can exist even if a contract is ultimately concluded between the parties, so long as there is a showing of breach of good faith during the negotiations. A seminal case on this matter, from the Italian high court, involved a farmer who applied to the national utility company for access to electricity for his irrigation system.¹³² The utility company took 18 months to begin providing electricity (thereby executing the contract) and the farmer sued for damages caused by the delayed service. The Court held that, “the conclusion of the contract does

¹³⁰ Tommaso Febbrajo, *Good Faith and Pre-Contractual Liability in Italy: Recent Developments in the Interpretation of Article 1337 of the Italian Civil Code*, 2 ITALIAN L. J. 291, 298 n. 17 (2016).

¹³¹ *Id.* at 295.

¹³² *Id.* at 299, n. 29 (footnote omitted).

not render irrelevant the behaviour contrary to good faith during the formation of a contract.”¹³³

In addition to this principle of Italian law, a second, and potentially more serious risk, for foreign investors in Italy is the law on disadvantageous contracts.¹³⁴ This article of the Italian civil code provides a remedy for a party who, due to misleading or incorrect information provided during the contract negotiation, suffers a loss.¹³⁵ The following two cases exemplify this principle.

In the first case, an investor purchased shares in a reputable Italian bank.¹³⁶ The investor made the purchase because of information found in the bank’s prospectus. However, that information was misleading, and the investor ultimately paid more than the fair market value for the shares. The court concluded that this was a violation of the good faith duty that led to a disadvantage for the buyer. The buyer was compensated the difference between the price paid and the market value of the shares.

The second case involved a buyer of an industrial machine.¹³⁷ During the contract negotiation, the seller informed the buyer that a government tax benefit would provide the buyer with a 33% rebate on his purchase. However, at the time the statement was made, unbeknownst to the seller, that subsidy expired. No mention of the subsidy appeared in the sales agreement, and the contract was concluded. When the buyer sued for compensation, the court again found bad faith and a disadvantageous contract. The buyer was awarded an amount equivalent to 33% of the contract price.¹³⁸

An important lesson from these cases regarding disadvantageous contracts is that the remedy ultimately integrates the points made pre-contractually into the final contract:

[T]he remedy for such a specific violation of good faith makes the pre-contractual information given by one party to the other legally binding as terms of the agreement: the party providing information is bound to perform in accordance with what was said, regardless of his or her intentions, aims and awareness.¹³⁹

¹³³ *Id.*

¹³⁴ CODICILE CIVILE [C. c.] art. 1337 (It.).

¹³⁵ *Id.*; Febbrajo, *supra* note 130, at 301.

¹³⁶ Febbrajo, *supra* note 130, at 293 n. 6.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 303.

And though no specific remedy for breach of good faith in contract negotiations has been established by the Italian civil code,¹⁴⁰ the fact that the code specifically creates liability for such breaches should place foreign investors on notice. The high court in Italy said in 2007 that, “the extent of pre-contractual liability cannot be precisely predetermined.”¹⁴¹ This is not a comforting assessment.

In their 2009 comparison of Dutch and American real estate contracts, Van der Veen and Korthals use a famous Dutch case as an example of the civil law application of good faith.¹⁴² In that case, a real estate developer was in the midst of negotiating a development contract with a community to build a swimming pool.¹⁴³ The developer drafted a proposal that was sent to the community, and they were given assurances that they would be awarded the contract. However, the community instead chose to use the developer’s proposal to solicit a bid from a third party, which it ultimately accepted. The developer sued and, despite the lack of a formal contract, recovered significant equitable damages, including the costs for preparing the proposal and expectation damages, a concept familiar to common law practitioners. “In Dutch law, good faith is used to bridge the gap that the adversary model of contract law assumes to exist between parties by stipulating that parties must attend to each other’s interests.”¹⁴⁴

The duty to negotiate in good faith, while non-existent in common law jurisdictions, is frequently applied in civil law jurisdictions, despite a lack of statutory guidance in many instances.¹⁴⁵ Pre-contractual liability for failure to negotiate in good faith had already been codified in Italy¹⁴⁶ and Germany.¹⁴⁷ However, French law is one example in which the statute had been silent as to the requirement for good faith in contract negotiations,

¹⁴⁰ *Id.* at 304.

¹⁴¹ *Id.* at 293, n. 6.

¹⁴² See JAMES GORDLEY, *THE ENFORCEABILITY OF PROMISES IN EUROPEAN CONTRACT LAW* 135 (Cambridge U. Press) (2001).

¹⁴³ *Id.*

¹⁴⁴ Van der Veen & Korthals, *supra* note 118, at 953.

¹⁴⁵ See PAULA GILKER, *PRE-CONTRACTUAL LIABILITY IN ENGLISH AND FRENCH LAW* (Kluwer Law International, 1st ed. 2002) (describing precontractual liability and good faith requirements in French law). *But see* Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70, 90–91 (1993) (explaining that the drafters of the UCC considered including a requirement that good faith principles apply to contract negotiation but chose not to).

¹⁴⁶ Arunachalam, Aarti, *An Analysis of the Duty to Negotiate in Good Faith: Precontractual Liability and Preliminary Agreement* (2002). *LLM Theses and Essays*. 22. https://digitalcommons.law.uga.edu/stu_llm/22. “The negotiating parties must deal with ‘a sense of probity . . . having always in mind the purpose which the contract is intended to satisfy, the harmony of the interests of the parties, and the superior interests of the nation requiring productive cooperation.’” (*citing* *Relazione al codice civile* (the Law on the Civil Code)).

¹⁴⁷ Bürgerliches Gesetzbuch [BGB] [CIVIL CODE], § 307 (Ger.).

then French courts filled that silence with consistent interpretations of the code that applied good faith requirements to negotiations in French law.¹⁴⁸

A 2016 change to the French civil code added a requirement that parties to a contract negotiation negotiate in good faith.¹⁴⁹ The original French code did not expressly mention good faith in the negotiation of a contract, only in the performance of that contract.¹⁵⁰ However, French courts generally extended the duty to pre-contractual negotiations as well as contract performance. The new law codifies this practice by establishing liability for bad faith in the negotiation process:

Art. 1104. Contracts must be negotiated, formed and performed in good faith. This provision is a matter of public policy.

Art. 1112. The commencement, continuation and breaking-off of pre-contractual negotiations are free from control. They must mandatorily satisfy the requirements of good faith.¹⁵¹

The concept of freedom of contract exists in European civil law as well; however, government intervention, often on behalf of consumers, has limited the scope of this freedom.¹⁵² Similarly,

The Dutch Supreme Court has held that parties must act in accord with ‘reasonableness and equity’ in negotiating a contract. As such, each party must take into account the reasonable interests of the other. In forcing this duty, a court may order a party to either proceed with or resume the negotiations or pay damages for breaking off negotiations. Most surprisingly, damages may be based on the injured party’s expectation interest. If a contract was sufficiently close to conclusion, a party’s expectation interest may include profits that would have been made had the envisaged contract been performed. No common law judge could conceive of such a result.¹⁵³

¹⁴⁸ See, e.g., BARRY NICHOLAS, *THE FRENCH LAW OF CONTRACT* 48, 71 (2d ed. 1992).

¹⁴⁹ See CODE CIVIL [C. CIV.] art. 1112 (Fr.).

¹⁵⁰ See CODE CIVIL [C. CIV.] art. 1134-35 (Fr.).

¹⁵¹ See CODE CIVIL [C. CIV.] art. 1112 (Fr.).

¹⁵² Jurgen Basedow, *Freedom of Contract in the European Union*, 16 EUR. REV. PRIVATE L. 901 (2008) (explaining that the concept of “freedom of contract” in civil law is theoretically present in EU and national laws, but consumer protection laws, among others, limit the application of this doctrine).

¹⁵³ Farnsworth, *supra* note 89, at 58.

The good faith principle is at the heart of the precontractual liability discussion. The point at which liability attaches, and the extent of that liability, can tremendously alter the risk faced by negotiating parties. French, Dutch and German law impose liability on parties that break off a contract negotiation in bad faith. Such damages are similar to reliance damages in common law courts, which allow for reimbursement of the reasonable expenditures leading up to the termination.¹⁵⁴ However, damages for breach of good faith in contract negotiations has no equivalent in common law.¹⁵⁵

b. Good Faith in the Common Law

Contrast that Dutch case with a similar example under common law, discussed in more detail in the next section, in which the court expressly rejected the concept of good faith in negotiations as “repugnant” to the adversarial nature of contract negotiations:

[T]he concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentationsA duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party.¹⁵⁶

The principle that good faith does not apply to a contract negotiation in common law is rooted in the belief that parties are free to make and break commitments prior to the execution of a contract and to pursue multiple parties in the quest for the best possible outcome. This seemingly underhanded and shady type of dealing is not necessarily how contracts are negotiated in commercial practice.¹⁵⁷ However, should a party not act in good faith in the process of negotiation, common law courts would unlikely impose liability on that party.

¹⁵⁴ See Conducting negotiations in France: The sudden breaking off of negotiations (“La rupture abusive des pourparlers”), Eversheds Paris (Feb. 2015), https://www.eversheds-sutherland.com/documents/global/france/Conducting_negotiations_in_France_note.pdf

¹⁵⁵ Marsden & Siedel, *supra* note 119, at 135–36 (explaining differing degrees of liability across civil law jurisdictions and the absence of liability in common law jurisdictions).

¹⁵⁶ Walford v. Miles, 1 All ER 453 at 460-1 (1992).

¹⁵⁷ See, e.g., Roger Brownswood, *Two Concepts of Good Faith*, 1994 JCL LEXIS 16 (1994) (explaining that in practice, most commercial entities negotiate in good faith despite the lack of legal obligation to do so).

The requirement to perform a contract in good faith has been a staple concept of the common law for at least 200 years.¹⁵⁸ More recently, it has been codified in the Uniform Commercial Code.¹⁵⁹ However, in both case law and code, it is quite evident that this duty applies to the performance stage of the contract and not to the negotiation stage.¹⁶⁰

The duty of good faith in the common law has its roots in freedom of contract. Courts are careful to give weight only to what parties chose to include in their contracts and take few liberties in interpreting beyond the language of the contract itself. This aligns with the general policy that parties are free to negotiate any terms they find agreeable, so long as they do not violate the law.¹⁶¹ There are exceptions to this general policy, such as public services and utilities, which must be provided to anyone who requests them without discrimination; however, these exceptions are limited and do not carry over to most commercial contracts.¹⁶²

“We have not yet reached the stage, where the selection of a trader’s customers is made for him by the government.”¹⁶³ This quote, from a 1915 Court of Appeals decision in New York, reflects the strong protection in common law courts for the freedom of contract. Shortly after this case, the *Lochner* era of regulation began in which courts largely refused government attempts to intervene, even if the contract disadvantaged workers.¹⁶⁴ And while we saw an increased penchant for common law courts to intervene in some contract areas—such as labor practices,¹⁶⁵ discriminatory practices,¹⁶⁶ and environmental protection¹⁶⁷—the general principle of freedom of contract remains as strong as ever.

Accordingly, the common law will not restrict the freedom of parties to enter into and subsequently withdraw from contract negotiations without liability.¹⁶⁸ This freedom encourages more active engagement in

¹⁵⁸ *Kirke La Shelle Co., v. Paul Armstrong Co.*, 88 N.E. 163, 167 (N.Y. 1933); *Boone v. Eyre*, 1 H. Bl 273, 126 Eng. Rep. 160(a) (K.B. 1777); *Kingston v. Preston*, 2 Doug. 689, 99 Eng. Rep. 437 (K.B. 1773).

¹⁵⁹ See Uniform Commercial Code [hereinafter “UCC”] § 1-304.

¹⁶⁰ See, e.g., *Kessler & Fine*, *supra* note 125, at 408.

¹⁶¹ *Id.* at 411–12; see also Mark Pettit Jr., *Freedom, Freedom of Contract, and the “Rise and Fall”*, 79 B.U. L. REV. 263 (1999).

¹⁶² See Peter W. Hanschen, *A Public Utility’s Obligation to Serve: Saber or Double-Edged Sword?*, *ELECTRICITY J.* (2004) (explaining the obligation for utilities in California to provide service on a non-discriminatory basis).

¹⁶³ *The Great Atlantic and Pacific Tea Co. v. Cream of Wheat Co.*, 227 FED. REP. 46 (1915); see also, Rome G. Brown, *The Right to Refuse to Sell*, 25 YALE L. J. 194 (1916).

¹⁶⁴ *Lochner v. New York*, 198 U.S. 45 (1905).

¹⁶⁵ *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

¹⁶⁶ *Reitman v. Mulkey*, 387 U.S. 369 (1967).

¹⁶⁷ See Richard A. Epstein, *Regulation—and Contract—in Environmental Law*, 93 W. VA. L. REV. 859 (1991).

¹⁶⁸ See Pettit, *supra* note 161.

potential deal-making and can incentivize parties to take more risks.¹⁶⁹ However, the line between a negotiation and a preliminary agreement is often thin.

Agreement on essential terms of a contract, even in the absence of definiteness, may be interpreted by both common and civil law courts as a complete contract. Courts in both jurisdictions are usually willing to fill in the gaps to complete a contract so long as there is clear evidence of the parties' intent to be bound by the existing terms.^{170 171} And while this will not turn one party's notion of an agreement into a binding contract in most cases, minor uncertainties will not prevent a court from refusing enforcement.¹⁷²

Similar to other common law jurisdictions, the United States confines the protection of good faith principles to the performance of the contract. Section 1-304 of Uniform Commercial Code (UCC) (formerly section 1-203) stipulates: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."¹⁷³ The comment to that section explicitly limits the scope of application for the doctrine of good faith in U.S. law. It states that the UCC:

does not support an independent cause of action for failure to perform or enforce in good faith . . . The doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached.¹⁷⁴

Similarly, the Restatement of Contracts, which is a compilation of key principles extracted from common law precedent, establishes a duty of

¹⁶⁹ See John M. Czarnetzky, *The Individual and Failure: A Theory of the Bankruptcy Discharge*, 32 ARIZ. ST. L.J. 393, 399 (2000) (presenting the "entrepreneurial hypothesis" that bankruptcy discharge and freedom of contract have the combined effect of encouraging entrepreneurs to act more entrepreneurially).

¹⁷⁰ See *Cohen & Sons, Inc. v. Lurie Woolen Co.*, 133 N.E. 370, 371 (N.Y. 1921); *United States v. City of New York*, 131 F.2d 909, 914-16 (2d Cir.), *cert. denied*, 318 U.S. 781 (1942).

¹⁷¹ Schweizerisches Zivilgesetzbuch [ZGB], Code civil [CC], Codice civile [CC] [Civil Code] Dec. 10, 1907, SR 210, RS 210, art. 2 (Switz.) (referring to the good faith, or *Vertrauensprinzip*, principle in Swiss law); BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 154 (Ger.) *translation at*

http://www.gesetze-im-internet.de/englisch_bgb/index.html. (Ger.) (detailing the German law principle that a contract is considered enforceable where the parties believe they have entered into a contract but have failed to agree on a specific point).

¹⁷² *Cohen & Sons*, 133 N.E. at 370-71.

¹⁷³ UCC § 1-304 (AM. LAW INST. & UNIF. LAW COMM'N 2017).

¹⁷⁴ *Id.* at cmt. 1.

good faith. However, this duty is expressly limited to the performance period of the contract, thus establishing no pre-contractual liability: “Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”¹⁷⁵ However, the comments to the Restatement also make abundantly clear that this section, as is the case with UCC section 1-304, does not apply to the negotiation phase of the contract:

Good faith in negotiation. This Section, like Uniform Commercial Code § 1-[304], does not deal with good faith in the formation of a contract. Bad faith in negotiation, although not within the scope of this Section, may be subject to sanctions. Particular forms of bad faith in bargaining are the subjects of rules as to capacity to contract, mutual assent and consideration and of rules as to invalidating causes such as fraud and duress.¹⁷⁶

It is important to note, as the comment above suggests, that other provisions within U.S. law may ultimately apply similar concepts as those found within the civil law. For instance, UCC Section 2-302, which provides a remedy for parties subjected to an unconscionable clause within a contract.¹⁷⁷ However, a number of cases show the narrow application of this clause and its inapplicability to pre-contractual negotiations.¹⁷⁸

Common law courts have been very clear in their refusal to apply good faith principles to contract negotiations, except for very limited circumstances,¹⁷⁹ or when the parties expressly agree to an obligation to negotiate in good faith.¹⁸⁰ There is no statutory or general case-based requirement to negotiate contracts in good faith, leaving the parties to determine if and when to break-off the negotiation.¹⁸¹

¹⁷⁵ RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST. 1981).

¹⁷⁶ RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. c (AM. LAW INST. 1981).

¹⁷⁷ UCC § 2-302 (AM. LAW INST. & UNIF. LAW COMM’N 2017).

¹⁷⁸ See *Kansas City Wholesale Grocery Co. v. Weber Packing Corp.*, 93 Utah 414, 73 P.2d 1272, 1275–76 (1937) (finding a clause limiting the time within which complaints about defects can be filed to be unconscionable when it excludes a defect only discoverable by microscopic analysis).

¹⁷⁹ See Browning Jeffries, *Preliminary Negotiations or Binding Obligations? A Framework for Determining the Intent of the Parties*, 48 GONZ. L. REV. 1, 13, nn.56–57 (2012) (examining limited exceptions based upon statutes or binding exclusivity clauses).

¹⁸⁰ See *SIGA Techs., Inc. v. PharmAthene Inc.*, 67 A.3d 330, 343–44 (Del. 2013) (“[A]n express contractual obligation to negotiate in good faith is binding on the contracting parties”).

¹⁸¹ See Robert Coyne and Kevin Evans, *Non-binding Preliminary Agreements: Use “Good Faith” with Caution*, FINANCIER WORLDWIDE (2008) (“Under English law, there is no recognition of an implied obligation to negotiate in good faith, and the inclusion of an express provision does not, in the absence of a binding agreement, limit a party’s ability to

3. Duty to Disclose/ Misrepresentation

Closely related to the concept of good faith is the duty to disclose information in a contract negotiation. Both common law and civil law establish some obligation of the parties to disclose material facts that would have a substantial impact on the ignorant party's decision to enter the contract at all.¹⁸² Consider the following case:¹⁸³

Organ (Buyer) and Girault (Seller) were negotiating over the commercial sale of tobacco in the United States during the War of 1812 when ports were blocked for trade. While considering the final terms of the sale, Organ received information from his brother who had been with the British fleet that the War was over, and the port would be reopened. Organ did not disclose this information to Girault but instead immediately accepted the offer and purchased the tobacco. When news broke the next day, the price of tobacco increased substantially.

Girault sued Organ contending that the latter had a duty to disclose information that would have had a material effect on their negotiation. Chief Justice Marshall disagreed and, in a brief opinion, found that Organ had no duty to disclose.¹⁸⁴ Since that case, common law courts have vacillated on whether to impose a duty to disclose. No clear guidance exists in the common law pointing to when this duty arises, absent a statute.

However, in a thorough analysis of caselaw in the United States regarding duties to disclose, Zeiler and Krawiec found that such a duty is more likely to be imposed where: 1) the defect to be disclosed was latent; 2) the information would update or correct previous disclosures; 3) full disclosure is often required when the parties have a fiduciary or confidential relationship; 4) illegally or tortuously-acquired information exists; and 5) the uninformed party is a buyer or lessee.¹⁸⁵ They also found that courts had more sympathy for uninformed parties who are sick, disabled, illiterate or elderly.¹⁸⁶ And interestingly, unlike in civil law systems, the authors found that common law courts are *not* more likely to require disclosure when the parties are of unequal bargaining power.¹⁸⁷

walk away from the negotiations.”); *see generally* Scott Timber Co. v. United States, 692 F.3d 1365, 1372 (Fed. Cir. 2012); Market St. Assocs. L.P. v. Frey, 941 F.2d 588, 595–97 (7th Cir. 1991); Land O’Lakes v. Gonsalves, 281 F.R.D. 444, 453 (E.D. Cal. 2012).

¹⁸² Febbrajo, *supra* note 128, at 301, n.40.

¹⁸³ Laidlaw v. Organ, 15 U.S. (2 Wheat.) 178 (1817).

¹⁸⁴ *Id.*

¹⁸⁵ Kathryn Zeiler and Kimberly D. Krawiec, *Common-Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories*, 91 VA. L. REV. 1795, 1880 (2005).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 1881.

Civil law takes a much stricter view of the duty to disclose, placing an onus on the party with information to share that information if it is necessary or proper to the uninformed party's decision-making process. The 2016 modified French law establishes a strict duty to inform (disclose) during the contract negotiation.¹⁸⁸ While this duty already existed for certain consumer transactions, this modification turns that duty into a general obligation to disclose any information that has a direct and necessary link to the contract. The law establishes liability for a party that fails to disclose necessary information in the course of contract negotiations and may allow a right of contract rescission if a contract was ultimately agreed upon.

While no-one can predict with certainty how the courts will develop some of these concepts, the recent codification in this area cries out for parties to 'dress up' and define the rules of courtship for prospective commercial partnerships. Where negotiations sour, or subsequent contractual performance disappoints, a failure to dress up may lead to downsides much greater than simply not holding on to your new partner.¹⁸⁹

Finally, the new French law also imposes a general obligation of confidentiality on the contract negotiation process.¹⁹⁰ By establishing liability for the disclosure to third parties of information obtained in the course of the negotiation without authorization, parties are more restricted in their ability to bargain between potential contract partners, playing terms off of one another. This creates a new era of transparency in the negotiation process while adding risk to the foreign investor hoping to withhold information or bargain with multiple parties in the interest of securing the best possible deal.

4. Reliance

In the absence of an agreement on material terms and a clear showing of intent to be bound, common law courts rarely provide a remedy to a party for commitments made during pre-contractual negotiations. The costs associated with negotiating and preparing for the potential eventuality of a contract are treated as sunk costs in the vast majority of cases. Reliance is one exception to this rule. It is a precontractual remedy

¹⁸⁸ CODE CIVIL [C. CIV.] art. 1112-1 (Fr.).

¹⁸⁹ Andrew Tetley & Aurélie Lopez, *Pre-contractual Negotiations – A New Codified French Regime*, REED SMITH: CLIENT ALERTS, (Feb. 24, 2017), <https://www.reedsmith.com/en/perspectives/2017/02/precontractual-negotiations--a-new-codified-french>.

¹⁹⁰ CODE CIVIL [C. CIV.] art. 1112-2 (Fr.).

found in exceptional cases that go far beyond a basic negotiation.¹⁹¹ The Restatement of Contracts explains that reliance is predicated upon inducement into an agreement that fails to satisfy formal contract norms and causes economic harm to the induced party.¹⁹²

In common law, reliance is typically applied in cases where some contract performance has already occurred under the guise of a quasi-contract. This may allow for recovery of expenses incurred following the acceptance of an offer to hire a performer who backs out before the performance,¹⁹³ making a bid based upon the bids of sub-contractors that were ultimately rescinded,¹⁹⁴ or where a distributor awarded a franchise license to a party despite that distributor lacking the power to do so.¹⁹⁵ Unlike most precontractual cases, each of these cases involves some degree of contract performance.

The *Red Owl v. Hoffman* case has long been taught in U.S. law schools as evidence of the ability of a party to recover reliance damages for preparatory costs associated with contract negotiations.¹⁹⁶ It is a case made famous not only because of the surprising outcome (awarding damages in the absence of any preliminary agreement) but also because of the colorful characters in the story. It is important to discuss the case here in some detail because it clearly exemplifies the legal analysis behind a claim of liability for pre-contractual discussions in the common law. I will briefly describe the case below.

In November 1959, Joseph Hoffman, the owner of a bakery in Wautoma, Wisconsin, contacted Sid Jansen at Red Owl Stores to inquire about setting-up a franchise. Discussions continued into the following year when Edward Lukowitz took over for Jansen. To speed things along, Hoffman decided he should get some experience in the grocery business,

¹⁹¹ See *Hoffman v. Red Owl*, 26 Wis. 2d 683 (1965) (providing reliance damages following years of preliminary promises that failed to result in a formal contract).

¹⁹² Restatement (Second) Contracts § 90 states:

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 1981).

¹⁹³ *Anglia Television v. Reed* [1972] 1, 3-4 QB 60 (Eng.) (finding that expenditures made both before and after the formation of the contract are recoverable).

¹⁹⁴ *Drennan v. Star Paving Co.*, 51 Cal.2d 409 (1958) (finding reliance where a subsidiary promise made to a principal contractor was relied upon with the expectation that it would be accepted if the principal was awarded the contract). *But see James Baird Co. v. Gimbel Bros. Inc.*, 64 F.2d 344 (2d Cir. 1933) (rejecting a finding of reliance where defendant subcontractor rescinded bid prior to acceptance by contractor).

¹⁹⁵ *Goodman v. Dicker*, 169 F.2d 684 (1948) (awarding reliance damages based upon knowledge by distributor that Goodman would rely on promises made).

¹⁹⁶ 26 Wis. 2d 683 (1965).

so he bought a local grocery store for \$16,000 in 1961 and advised Lukowitz that he was doing this to “get a little experience” before taking on a larger business like Red Owl.¹⁹⁷ Hoffman ran the store at a profit, and Red Owl representatives visited him in 1961.

Upon seeing Hoffman doing well, Lukowitz urged Hoffman to sell his grocery business to his associate, Edward Wrysinski, so that he could free up the cash he needed for the Red Owl franchise. Hoffman sold the store at a \$2,000 profit. Subsequently, Hoffman and Lukowitz jointly identified a location for the new store, and Hoffman paid \$1,000 for an option to purchase a lot there. Red Owl was under the impression that Hoffman would be selling his bakery in order to generate the cash to support the Red Owl franchise, but Hoffman never intended to sell the bakery and instead planned to take out a loan to get the funds needed for the franchise.

Over the next several months, Hoffman and Red Owl went back and forth with a number of financing proposals requiring Hoffman to take out a variety of loans, including taking out equity from his bakery, in order to free enough cash for the franchise. Red Owl made statements such as, “we are ready to go forward,” but still imposed additional barriers to a final agreement. By February of 1962, Red Owl had imposed requirements that Hoffman was unable to meet, leading Hoffman to withdraw from the negotiation and threaten to sue Red Owl for “ill-advice.”

At a jury trial, Hoffman argued that he relied on the representations made by Red Owl and, in so doing, suffered significant economic losses by, among other things, selling his grocery store, purchasing a lot for the Red Owl store, and selling his bakery building. The jury sided with Hoffman and awarded him \$20,000 in damages, an amount that included the full value of the grocery store.

Red Owl appealed in 1965 on the issue of whether a party is entitled to damages in a preliminary negotiation on the grounds of reliance, or promissory estoppel.¹⁹⁸ The court began its discussion by citing the Restatement of Contracts explanation of promissory estoppel, which says:

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.¹⁹⁹

¹⁹⁷ William C. Whitford & Stewart Macaulay, *Hoffman v. Red Owl Stores: The Rest of the Story*, 61 HASTINGS L.J. 801, 810 (2010).

¹⁹⁸ *Hoffman*, 26 Wis. 2d 683 (1965).

¹⁹⁹ RESTATEMENT (FIRST) OF CONTRACTS § 90 (AM. LAW INST. 1933).

In referring to a promise, the Restatement is speaking of representations made by a party that would induce them to take certain actions, which may ultimately be detrimental to them. The court explained that if the representation made by the party is too indefinite to be considered a promise, it would not support a claim of reliance.²⁰⁰ In this case, the California Supreme Court agreed with the lower court that Red Owl had made promises to Hoffman that he relied upon and that, despite the fact that no manifestation of intent to conclude the contract was made clear, Hoffman could reasonably have been expected to rely on those promises. The Court affirmed the lower court's decision allowing Hoffman to recover damages for reliance on Red Owl's promises, though the final amount awarded was reduced.

The *Red Owl* case is significant principally for two things: first, it is a novel application of the doctrine of promissory estoppel, or reliance, which is generally reserved for negotiations that result in a fairly advanced preliminary agreement, which was not the case here. And second, it is an outlier in our precedential history of pre-contractual liability.²⁰¹

In their study of over 100 cases presenting the issue of pre-contractual liability between 1999 and 2003, Alan Schwartz and Robert Scott found that 87% of those cases resulted in no recovery for losses incurred.²⁰² Only cases involving misrepresentation or deceit led to recovery in their sample. They concluded, "Courts consistently have denied recovery for pre-contractual reliance unless the parties, by agreeing on something significant, indicated their intention to be bound."²⁰³ Their suggestion is that pre-contractual liability in the absence of intent to be bound or fraud will not offer recovery to an injured party in a common law jurisdiction.

5. Revocability of Offers Prior to Acceptance

This final section regarding remedies briefly explains the issue of revocability of an offer prior to acceptance. When an offeror makes an offer to an offeree, a period of time may emerge between delivery of the offer and acceptance or rejection of that offer. This period is particularly dangerous for both parties as it can create unexpected results. If the offeror chooses to rescind their offer prior to acceptance, the offeree may suffer because they may have taken steps in reliance on that offer that caused

²⁰⁰ Robert E. Scott, *Hoffman v. Red Owl Stores and the Myth of Pre-contractual Reliance*, 68 OHIO ST. L. J. 71, 1, 20–32 (2007) (discussing the "indefiniteness doctrine" and how uncertain or unclear representations do not qualify as promises).

²⁰¹ Schwartz & Scott, *supra* note 36, at 671–73 (describing a study of 105 cases between 1993 and 2003 that focused on recovery for pre-contractual liability and finding that 87% denied recovery).

²⁰² *Id.*

²⁰³ *Id.* at 673.

them harm, such as refusing other offers or selling assets to acquire resources to accept the offer. Yet if the offeree accepts while the offeror is in the process of rescinding or after the offeror has had his offer accepted by a third party, the offeror may be harmed by the dual exposure.

The Restatement and associated common law cases place much of the power over the acceptance with the offeror rather than the offeree. Once an offeror makes an offer, that offeror may rescind their offer at any time prior to acceptance by the offeree. This rescission may be made through direct communication,²⁰⁴ indirect communication,²⁰⁵ or, if it was a public offer, through the same public means used to make the original offer.²⁰⁶ However, the offeree does have the ability to form a valid contract through a variety of mechanisms, such as notifying the offeror,²⁰⁷ mailing an acceptance,²⁰⁸ or performance of the terms of the agreement.²⁰⁹ Note that the common law and UCC differ with respect to offer and acceptance rules, yet both recognize the revocability of the offer prior to acceptance.²¹⁰ The most significant distinction is with respect to offers that specify a time for acceptance, which are generally temporarily irrevocable under civil law but revocable under common law.

Under French law, for instance, the offeror may not rescind their offer for the time specified in that offer or, if a time is not specified, for a reasonable period of time.²¹¹ In addition, for consumer contracts, a French consumer is permitted up to seven days to rescind their acceptance of a purchase made from a professional.²¹² Germany has the strictest law in terms of revocability. An offeror has no right to rescind once an offer has been made.²¹³ However, an offer under German law terminates after the time period specified for acceptance or after a reasonable period of time.²¹⁴ And under Dutch law, an offer is revocable at any time unless the offer states a period of time for acceptance (similar to French law).²¹⁵ It is important to note here that the Convention on the International Sale of

²⁰⁴ RESTATEMENT (SECOND) OF CONTRACTS § 42 (AM. LAW INST. 1981).

²⁰⁵ *Id.* at § 43.

²⁰⁶ *Id.* at § 46.

²⁰⁷ *Id.* at § 56.

²⁰⁸ *See id.* at §§ 63(a), 66.

²⁰⁹ *Id.* at § 56 cmt. a. *But see* § 60 (requiring strict compliance with the terms of the offer regarding the manner of permissible acceptance).

²¹⁰ *See* U.C.C. § 2-206 (AM. LAW INST. & UNIF. LAW COMM'N 2017) (allowing for additional flexibility in the acceptance of an offer).

²¹¹ Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 17, 1958, D. Jur., 1959, 33 (Fr.). (preventing an offeror from rescinding their offer to sell a chalet four days after that offer was made).

²¹² CODE DE LA CONSOMMATION art. L121-25, L311-15 (Fr.).

²¹³ *See* BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], §145 (Ger.).

²¹⁴ *Id.* at §§ 146-49.

²¹⁵ Art. 6:219 para. 1 BW (Neth.).

Goods, which applies to commercial sales contracts in many civil and some common law countries, splits the difference between these two approaches. Offers are revocable any time prior to acceptance unless they state a fixed time for acceptance, expressly indicate irrevocability, or it would be reasonable to assume the offer was irrevocable.²¹⁶

The above discussion above has identified four key areas of risk for the unwitting cross-border entrepreneur. They highlight scenarios in which a potential common law jurisdiction investor could be at risk for liability based upon their precontractual words or deeds, and a potential civil law jurisdiction investor at risk for losses stemming from the non-binding words and deeds of a common law partner.

C. Theory

This section evaluates the relationship between legal tradition and the level of entrepreneurial activity in that business environment in an attempt to provide some insight into the deterrent effect of the risks discussed above. Previous studies that have examined the linkage between common law legal environments and more robust economic growth and business development have focused their attention on the independence of the courts, government involvement in private business matters, and contract enforcement.²¹⁷ And while an entrepreneur undoubtedly considers all of these elements at some point in the formation and operation of their business, most of them are matters with limited effect on the exploratory phase of business development. Effective contract enforcement is essential once a business relationship has been established and the entrepreneur begins contracting with partners, laborers, suppliers, and so forth. Effective judicial institutions are essential for ensuring that the entrepreneur has a forum to pursue legal actions against breaching parties, tortfeasors and the like.²¹⁸ This was the central tenet of Nobel Laureate Douglass North's seminal work on the relationship between judicial institutions and economic performance.²¹⁹

²¹⁶ United Nations Convention on Contracts for the Sale of Goods art. 16, Apr. 11, 1980, S. Treaty Doc. No. 98-9 (1983), 1489 U.N.T.S. 62; *see also* Joseph Lookofsky, *The 1980 United Nations Convention on Contracts for the International Sale of Goods*, in INTERNATIONAL ENCYCLOPAEDIA OF LAWS – CONTRACTS (Supp. 29) (Jacques H. Herbots ed., 2000).

²¹⁷ *See* LLSV, *supra* note 6; *see also* Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. OF LEGAL STUD. 503 (2001) (highlighting the importance of the common law's limited government-involvement approach as a key driver of economic growth).

²¹⁸ *See* Kenneth W. Dam, *The Judiciary and Economic Development* (John M. Olin L. & Econ., Working Paper No. 287, 2006).

²¹⁹ North, *supra* note 1, at 100.

North's argument that effective contract enforcement, judicial independence, and property rights create an environment that is conducive to economic growth over time, is rooted in the perception of security that those elements give to potential investors.²²⁰ When an investor is confident that his or her contract has the weight of law behind it and an efficient judiciary to enforce it, its value is significantly enhanced. However, it is the absence of government interference in the pre-contractual stages of commercial relationships that appears to lubricate the entrepreneurial investment environment. During this exploratory stage, investors may prefer the flexibility that non-enforceability of pre-contractual agreements provide along with the security that a completed contract ensures.²²¹

The exploratory phase for an entrepreneur may involve discussions with potential partners, investors, and staff, existing business owners, likely suppliers, and other service providers that will contribute to the launch of the new endeavor.²²² These discussions may involve certain representations about the business or the potential relationship between the parties. They may include commitments to take steps toward the conclusion of a contract. And they may include promises to work together in good faith toward a mutually beneficial goal.

The immediate legal concern for an entrepreneur operating within this exploratory phase may be his or her potential liability for commitments made before the business begins operations. In some cases, the entrepreneur may make a handful of wise agreements with partners and carry them all forward into the launch of the venture. However, for any number of reasons, an entrepreneur may terminate negotiations with some potential partners or may fail to launch the business at all.²²³ In those cases, is the entrepreneur liable for commitments made to his or her potential partners? This question is less easily answered than it may appear and is

²²⁰ *Id.* at 100–01.

²²¹ See Juliet P. Kostritsky, *Bargaining with Uncertainty, Moral Hazard, and Sunk Costs: A Default Rule for Pre-contractual Negotiations*, 44 HASTINGS L.J. 621, 680 (1993) (discussing the increasing risk faced by parties as they approach more closely a finalized contract).

²²² See Laurel Delaney, *20 Factors to Consider Before Going Global*, ENTREPRENEUR (Dec. 16, 2004), <https://www.entrepreneur.com/article/75138> (laying out the steps for an entrepreneur looking to go abroad).

²²³ See Alexandra Dickinson, *How to Know when It's Time to Walk Away from a Negotiation*, FORBES (Aug. 29 2017, 10:55 AM), <https://www.forbes.com/sites/alexandradickinson/2017/08/29/how-to-know-when-its-time-to-walk-away-from-a-negotiation/#3f400bb66112> (discussing the wish, want, and walk strategy for contract negotiation); see also Ted Leonhardt, *When to Walk Away from the Negotiating Table*, FAST COMPANY (Mar. 16, 2016), <https://www.fastcompany.com/3057845/when-to-walk-away-from-the-negotiating-table> (explaining how walking away can be a positive learning experience).

quite different in common and civil law jurisdictions, and the following section explores this issue.

The contract is at the heart of commercial transactions. Contracts underlie transactions such as leasing or buying land or facilities, hiring staff, buying supplies and assets, financing the business, and of course, interacting with customers and clients, just to name a few. In order to assess, as a general matter, which legal tradition provides a more hospitable environment for the creation of new businesses, we must understand the contract formation process. And while most contracts begin with a negotiation phase, not all negotiations lead to a contract. In the business context, this period between the negotiation and the contract execution is the area of most risk for the potential entrepreneur.

Negotiating a potential contract requires risk-taking.²²⁴ Resources must be devoted to the negotiation process, and many potential deals are discarded when better deals appear on the horizon.²²⁵ An effective negotiation is not necessarily the one that ends in a perfect deal; it is the one that ends in the best possible deal given the circumstances. Knowing this, negotiators may pursue multiple deals simultaneously, sometimes leveraging benefits offered by one against a deal offered by another.²²⁶ In each case, the negotiator is putting the entire deal at risk in the interest of securing as much as they can from the other party. But that is not the only risk involved in contract negotiations.

In order to extract promises from another party, contract negotiators usually have to make promises themselves.²²⁷ Those promises may be broad or specific, clear or ambiguous, reliable or not. But without promises, there is little for the parties to negotiate. Yet promises made during a contract negotiation are intended for only one function—to discover what will be given in return if a contract is agreed upon. A buyer may promise to purchase all of a manufacturer's stock, but if the manufacturer responds with a price the buyer objects to, the buyer's promise may be moot as he may choose not to do business with that manufacturer. What rights does the manufacturer have to enforce that buyer's promise? Was the buyer's promise enforceable? That all depends on the legal environment in which they are negotiating.

²²⁴ See Kostirtsy, *supra* note 221, at 679; see also Juliet P. Kostirtsy, *Uncertainty, Reliance, Preliminary Negotiations and the Holdup Problem*, 61 S.M.U. L. REV. 1377, 1384–85 (2008).

²²⁵ See David B. Falk, *The Art of Contract Negotiation*, 3 MARQ. SPORTS L.J. 1, 22–23 (1992).

²²⁶ See George Siedel & Helena Haapio, *Using Proactive Law for Competitive Advantage*, 47 AM. BUS. L.J. 641 (2010) (discussing the use of contract law to gain strategic advantage in negotiations).

²²⁷ See Anthony J. Bellia, Jr., *Promises, Trust, and Contract Law*, 47 AM. J. OF JURIS. 25, 26 (2002).

A legal environment in which liability attaches for representations made or disclosures withheld during the negotiation phase adds a layer of risk to the party that may not be ready to commit to a formal contract yet.²²⁸ On the contrary, such an environment provides additional protections to the party that takes steps in reliance on the representations made by the party unwilling to commit to the formal contract. This difference may be significant, creating risk for parties hoping to negotiate with multiple partners, and opportunity for parties in a weaker negotiating position.

D. Methodology

The question that this article poses is the following: does legal tradition, due to differences in pre-contractual rules, affect a foreign investor's appetite for new investments? In other words, does the risk of liability during contract negotiations help or hinder opportunities for entrepreneurial growth?

A straightforward way to answer this question would be to compare outcomes in cases of pre-contractual liability across common and civil law jurisdictions by reviewing jurisprudence and judgments. However, in the case of both common and civil law countries, such cases rarely manifest in judicial opinions that can be used for comparative analysis.²²⁹ Most cases of this ilk are resolved through negotiation or commercial arbitration where no opinions are readily accessible.²³⁰ Thus, another approach is necessary to resolve this question.

The second-best approach to answering this question seems to be through statistical analysis accompanied by a small sampling of anecdotes from cross-border transactional attorneys. With this approach, we can draw inferences from changes in the investment environment over time and contrast those changes across legal environments. For the statistical analysis, I assess whether there is a significant relationship between legal tradition and total entrepreneurial activity over time. For the qualitative inquiry, I inquired of numerous international practitioners in common and civil law jurisdictions to determine their awareness and level of counseling on pre-contractual liability risks.²³¹ I received substantive responses from ten practitioners across civil and common law legal systems. Together, the

²²⁸ Cardenas, *supra* note 124, at 947–48 (discussing the different approaches to risk in merger and acquisition agreement negotiations).

²²⁹ See Schwartz & Scott, *supra* note 36, at 691 (applying data from appellate contract breach cases rather than breaches of pre-contractual obligations because such agreements are “sometimes unwritten and, moreover, are not collected.”).

²³⁰ See *id.*

²³¹ Practitioners were identified via the American Bar Association's International Commercial Transactions electronic group and the American Society for International Law.

data and analysis will provide useful insights into the effects of legal tradition on investor risk.

1. Quantitative Inquiry

The quantitative analysis component of this study will use the number of start-up businesses formed between common law and civil law jurisdictions as a proxy measure of entrepreneurial activity across countries as the dependent variable, and legal tradition as the independent variable. Measured over a period of years, this proxy measure will reflect how entrepreneurial activity has changed over time and whether there is a significant difference of growth in countries that follow common or civil law legal traditions. A regression analysis will help show the existence and strength of any such relationship.

To measure the number of start-up firms in different countries, I will use the Global Entrepreneurship Survey (GES), which is one of the most comprehensive and widely used tools for measuring entrepreneurial activity around the world.²³² The survey is conducted by the Global Entrepreneurship Monitor (GEM), a joint effort between Babson College and London Business School that provides data on entrepreneurship for researchers around the world.²³³ Their annual survey assesses developed and emerging markets around the world on a number of factors that influence entrepreneurial activity in those countries.

Innovation has been identified in the National Framework Conditions as the third stage of economic development, following factor-driven and efficiency-driven economies. According to the GEM:

The GEM conceptual framework derives from the basic assumption that national economic growth is the result of the personal capabilities of individuals to identify and seize opportunities, and that this process is affected by environmental factors which influence individuals' decisions to pursue entrepreneurial initiatives.²³⁴

The GEM measures entrepreneurial activity in three stages: 1) Total Early-Stage Entrepreneurial Activity, which identifies adults starting or operating a new business within the previous 42 months; 2) Rate of Established Businesses, which includes adults owning or operating a business for more than the past 42 months; and, 3) Business

²³² *Global Reports*, GLOBAL ENTREPRENEURSHIP MONITOR, <https://www.gemconsortium.org/report> (last visited Jan. 23, 2019).

²³³ *See What is GEM?*, GLOBAL ENTREPRENEURSHIP MONITOR, <https://www.gemconsortium.org/about/news> (last visited Jan. 24, 2019).

²³⁴ GEM GLOBAL REPORT 2016/17 14 (2017), <https://www.gemconsortium.org/report>.

Discontinuation Rate, which includes adults who have discontinued a business in the past 12 months.²³⁵ The data includes responses from surveys distributed in 64 countries. The next section includes the results from both the quantitative and qualitative analyses.

According to the National Expert Survey, also conducted by the GEM, the second most important factor taken into account by early-stage entrepreneurs following physical infrastructure is the commercial and legal infrastructure.²³⁶ North America has the most supportive entrepreneurship ecosystem, while Latin American and Africa struggle with the least favorable entrepreneurship conditions.²³⁷ “Perhaps it is no coincidence that North America is made up of countries with common law jurisdictions whereas Latin America and Africa are composed of civil jurisdiction countries.”²³⁸

To determine which legal environment is more hospitable to entrepreneurial activity, I extracted data from ten years of the GEM survey identifying total early-stage entrepreneurial activity in 64 countries and notated the type of legal system utilized in each of those countries. I further divided those countries by legal tradition, as displayed in Figure 1, below.

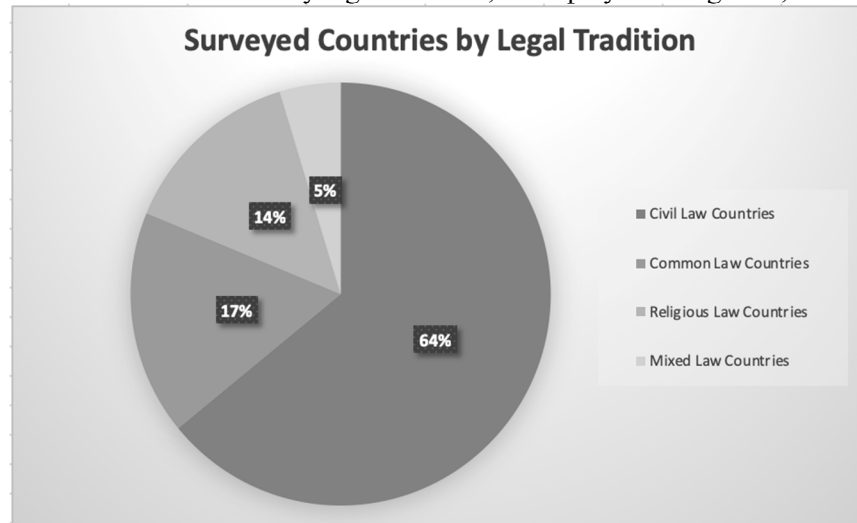


Figure 1. Countries from 2016 GEM Survey by Legal Tradition.

Because the focus of this article is on only common and civil law legal traditions, I have eliminated the religious and mixed systems from the remainder of the analysis. Of the remaining countries that were surveyed by the GEM report, I calculated the average early-stage entrepreneurial

²³⁵ *Id.* at 16.

²³⁶ *Id.* at 31–32.

²³⁷ *Id.* at 31.

²³⁸ *Id.*

activity among the civil law countries and among the common law countries. Such activity in common law countries was only slightly higher, on average, than in civil law countries, as noted in Figure 2, below.

Average Early-Stage Entrepreneurial Activity

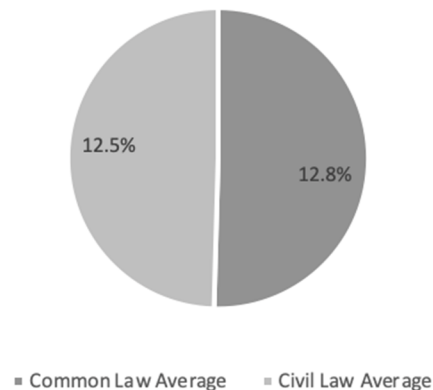


Figure 2. Average Early-stage Entrepreneurial Activity.

The difference in the two legal traditions with respect to early-stage entrepreneurial activity becomes much clearer when filtering countries by stage of development. Factor-driven economies are countries that pursue competitive advantage exclusively on the basis of factor endowments, such as natural resources. Investment-driven economies are those countries that focus on manufacturing of basic goods to drive economic growth. And innovation-driven economies are advanced economies that have solid infrastructure and legal institutions that facilitate investment in technologies that give these countries competitive advantages over factor-driven and efficiency-driven economies.²³⁹

For the purposes of this analysis, I have chosen to focus only on innovation-driven economies (see Table 1, below). These economies encourage foreign investment and, in most instances, maintain laws that allow such investments. I broke down the data above into groupings based upon their stage of development as notated by the GEM report—factor-driven, efficiency-driven, and innovation-driven.²⁴⁰ Countries falling within the category of “innovation-driven” economies are those that are characterized as having strong institutions and incentives driving

²³⁹ See, e.g., *Stages of Development*, HARV. BUS. SCH., <http://www.isc.hbs.edu/competitiveness-economic-development/frameworks-and-key-concepts/pages/shapes-of-development.aspx> (describing the distinctions between stages of economic development).

²⁴⁰ GEM GLOBAL REPORT 2017/18 17–18 (2018) (defining the stages of development).

innovation.²⁴¹ The risks associated with investment in factor- or investment-driven economies include political and economic instability, risks that are less prevalent in the innovation-driven economies. Countries that meet these criteria are listed below:

Table 1. Innovation-driven Countries Segmented by Legal Tradition.

<i>Innovation-Driven Civil Law Countries</i>	<i>Innovation-driven Common Law Countries</i>
Austria	Australia
Estonia	Canada
Finland	Hong Kong
France	Ireland
Germany	Israel
Greece	Jamaica
Italy	United Kingdom
Korea	United States
Luxembourg	
Netherlands	
Portugal	
Slovenia	
Spain	
Sweden	
Switzerland	
Taiwan	

Again, taking the average early-stage entrepreneurial activity percentage from each of these countries and comparing them by legal tradition, the stark contrast between the two becomes evident. The figure below represents the division between civil law and common law innovation-driven economies (see Figure 3, below).

²⁴¹ *Stages of Development*, *supra* note 239.

Average Early-Stage Entrepreneurial Activity Among Innovation Driven Economies

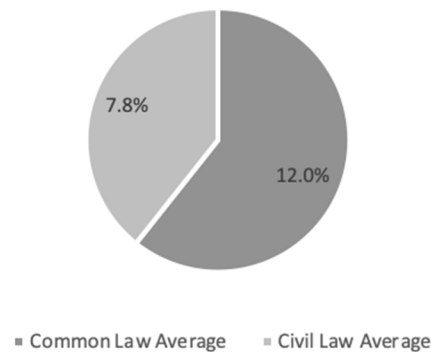


Figure 3. Innovation Driven Economies Segmented by Legal Tradition.

This data represents the situation in the current climate. But has there been a consistent advantage of common law systems over civil law systems in promoting entrepreneurial economic activity? To answer this, I extracted data from ten years of GEM surveys and measured the effect of legal tradition—common vs. civil law—on total entrepreneurial activity among innovation-driven economies over this period. The result was that in innovation-driven economies, legal tradition had a significant impact on the level of entrepreneurial activity (see Table 2 and Figure 5, below).

The analysis is limited by the number of observations and the amount of available comparable data for the time period. I utilized GEM data from 2001 through 2016 for all civil and common law countries in their dataset. The GEM surveys 54 countries covering 86% of global GDP.²⁴² I then added the following independent variables: 1) stage of development (efficiency-driven, factor-driven or innovation-driven); 2) degree of contract enforcement;²⁴³ 3) perceived opportunities to form a firm; 4) fear of failure rate; 5) percentage of individuals intending to start a new business in the next three years; and, 6) Total Early-Stage Entrepreneurial Activity.

The regression below includes civil law (Group 0) and common law (Group 1) countries only. Data was gathered from GEM surveys between 2006 and 2016 for which data was available. A combined 284 observations were used in this calculation. The null hypothesis used here is that there is no difference in level of entrepreneurial activity between civil and common law legal systems. The resulting P-value is significant at the .001

²⁴² GLOBAL REPORT 2017/18, *supra* note 240, at 11.

²⁴³ WORLD BANK GROUP, DOING BUSINESS 2017 (14th ed. 2017).

level, meaning that we reject the null hypothesis and conclude that there is likely a significant difference in levels of entrepreneurial activity between civil and common law countries based upon legal tradition.

Table 2. T-Test with equal variance comparing means of civil and common law systems against total entrepreneurial activity.

Two-sample t test with equal variances

Group	Obs	Mean	Std. Err.	Std. Dev.	[99% Conf. Interval]	
Civil La	199	6.998744	.2838671	4.004439	6.260437	7.73705
Common L	85	9.038941	.3235007	2.982529	8.186312	9.89157
combined	284	7.609366	.2277846	3.838694	7.018649	8.200083
diff		-2.040197	.4832441		-3.293431	-.7869641

diff = mean(Civil La) - mean(Common L) t = -4.2219
 Ho: diff = 0 degrees of freedom = 282

Ha: diff < 0 Ha: diff != 0 Ha: diff > 0
 Pr(T < t) = 0.0000 Pr(|T| > |t|) = 0.0000 Pr(T > t) = 1.0000

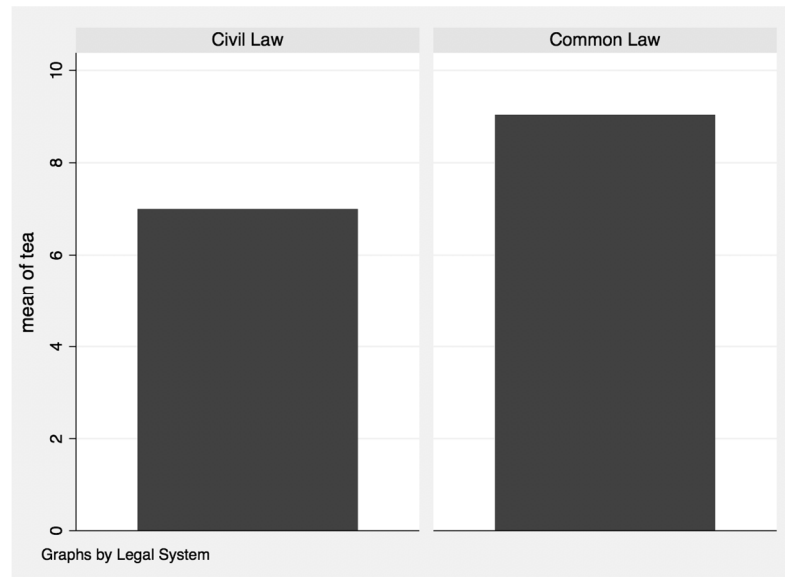


Figure 4. Graphical representation of T-Test comparing means of civil and common systems against total entrepreneurial activity.

Source	SS	df	MS	Number of obs	=	261
Model	2581.56911	4	645.392277	F(4, 256)	=	120.11
Residual	1375.52403	256	5.37314076	Prob > F	=	0.0000
				R-squared	=	0.6524
				Adj R-squared	=	0.6470
Total	3957.09314	260	15.219589	Root MSE	=	2.318

	tea	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]
	rol	4.77094	1.637589	2.91	0.004	1.546079 7.995802
Entrepreneurial intentions		.3827501	.0189843	20.16	0.000	.3453649 .4201354
contract_n		.022129	.0298639	0.74	0.459	-.0366812 .0809393
system_n						
Common Law		2.487498	.3390179	7.34	0.000	1.819879 3.155117
_cons		-1.797197	1.410473	-1.27	0.204	-4.574805 .9804107

Figure 5. Regression analysis of the effects of legal tradition on total entrepreneurial activity.

The regression (see Figure 5, above) was conducted to assess the correlation between legal tradition and total entrepreneurial activity (TEA). Three control factors were used—the rule of law factor, which measures investor risk based upon the legal and political climate; the Entrepreneurial Intentions factor,²⁴⁴ which measures perceived investment opportunities in the target market; and the contract factor, which measures the perceived security of contracts.²⁴⁵ The regression shows that approximately 65% of the impact on TEA stems from the factors accounted for in this analysis. It also shows that legal system, represented by “system_n,” is statistically significant at the 99% confidence level, indicating a strong impact on TEA.

The T-Test and regression displayed above show a correlation between legal system and entrepreneurial activity in innovation-driven economies; however, it must be noted that correlation does not equate to causation. A number of other factors could be affecting the investment environment, including political risk, market size, and the governing environment in which the investment would be made. Nevertheless, other studies using distinct methodologies have found that there is good reason to conclude that legal tradition affects the economic environment.

The most well-known economic analysis of legal traditions and their impact on the economic environment was conducted by World Bank researchers in 2008.²⁴⁶ In that study, the researchers concluded that

²⁴⁴ This factor is captured by the GEM survey. See GEM GLOBAL REPORT, *supra* note 240.

²⁴⁵ See WORLD BANK, *supra* note 243.

²⁴⁶ See LLSV, *supra* note 6; see also Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. OF ECON. LIT. 285 (2008) (finding that common law countries typically performed better in economic performance indicators than civil law countries).

common law countries tended to fare better in the areas of institutions, judicial independence, and investor protections.²⁴⁷ These are some of the same criteria that create an environment conducive to entrepreneurial activity. But in order to link these findings to pre-contractual liability, we must assess whether it is in fact the risk of pre-contractual liability that is deterring investors from operating as frequently in civil law countries as they are in common law countries. For this, a qualitative analysis is necessary.

2. Qualitative Inquiry

While the quantitative data shows that there is a significant relationship between legal tradition and entrepreneurial activity over time, this does not necessarily mean that it is pre-contractual liability *per se* that drives the difference. We do know that legal tradition influences investment,²⁴⁸ and many factors—including the use of precedent, adversarial proceedings, or even the influence of juries—may have an impact on the decision of which legal system should govern a transaction.²⁴⁹ Nevertheless, one of the factors that may drive the initial decision by an investor about which country to invest in is their confidence in the negotiation process. Whether they will be required to disclose adverse information, attest to representations that may hurt their bargaining position, or negotiate in good faith at all, may affect the strength of the position of the investor.

To add context to the quantitative analysis above, I asked several cross-border legal practitioners in both civil and common law countries about their sense of investment risk related to distinctions in pre-contractual liability. My conversations included the General Counsel of a Dutch multinational company,²⁵⁰ an Italian attorney from Price Waterhouse Coopers,²⁵¹ and attorneys at law firms in Ecuador,²⁵²

²⁴⁷ La Porta, Lopez-de-Silanes & Shleifer, *supra* note 246, at 298.

²⁴⁸ See Leon E. Trakman, *The Twenty-First-Century Law Merchant*, 48 AM. BUS. L.J. 775, 809–10 (2011) (describing the effect of uniform law movements on the equalization of investment environments across civil and common law jurisdictions).

²⁴⁹ See Charles A. Bane, *From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law*, 37 U. MIAMI L. REV. 351 (1983).

²⁵⁰ Interview with Christopher King, VP and Gen. Counsel, Hunter Douglas, in N.V., Neth. (Oct. 1, 2017).

²⁵¹ Interview with Fabio Alberto Regoli, Senior Lawyer, Price Waterhouse Coopers, It. (Sept. 29, 2017).

²⁵² Interview with Leonardo Sempertegui, Partner, Sempertegui Ontaneda, Abogados, Ecuador and D.C. (Sept. 29, 2017).

Argentina,²⁵³ Uruguay,²⁵⁴ Indonesia,²⁵⁵ Poland,²⁵⁶ and the United States.²⁵⁷ An overview of those informative conversations is included below.

According to the general counsel of a major Dutch multinational company, the risks of pre-contractual liability differ depending on which side of the transaction the investor sits.²⁵⁸ A buyer of goods, services, or intellectual property would be better protected in an environment that requires full disclosures and good faith negotiation, which they would find in a civil law environment. Likewise, an investor selling goods, services, or intellectual property would be better positioned in an environment that allows the parties to choose what to disclose or represent and that does not statutorily establish requirements for the negotiation process, which would be the case in a common law jurisdiction. This is part of the reason why common law contracts, which must spell-out such pre-contractual measures, tend to be significantly longer and more thorough than civil law contracts, which can look to statutes to provide such measures.²⁵⁹

A U.S. legal practitioner suggested that the major risk apparent in pre-contractual liability between legal systems exists in the good faith negotiating requirements that are present in civil but not common law jurisdictions.²⁶⁰ The German legal concept of *culpa in contrahendo*, which obligates negotiating parties to act in good faith, establishes clear statutory requirements on negotiating parties before a contract is formed. A thorough analysis of this concept and the risks that it poses was published in 1964:

Once parties enter into negotiations for a contract, the sweeping language of the cases informs us, a relationship of trust and confidence comes into existence, irrespective of whether they succeed or fail. Thus, protection is accorded against blameworthy conduct which prevents the consummation of a contract. A party is liable for negligently creating the expectation that a contract would

²⁵³ Interview with Rafael Pereyra Zorraquin, Attorney, Navarro Castex Abogados, Arg. (Sept. 29, 2017).

²⁵⁴ Interview with Jonás Bergstein, Partner, Bergstein Abogados, Uru. (Oct. 1, 2017).

²⁵⁵ Interview with Sasha Bharwani, Foreign Associate, Dewi Negara Fachri & Partners, Indon. (Sept. 29, 2017).

²⁵⁶ Interview with Wojciech Baginski, Attorney, Baginski Pro, Pol. (Sept. 29, 2017).

²⁵⁷ Interview with Louis B. Goldman, Managing Partner, Navigator L. Group, Chi. (Oct. 3, 2017).

²⁵⁸ See Interview Christopher King, *supra* note 250.

²⁵⁹ See WORLD BANK GROUP, *Key Features of Common Law or Civil Law Legal Systems*, <http://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-systems/common-vs-civil-law> (identifying the more prescriptive approach to contracts taken by civil law legal systems); see also Fandl, *supra* note 58.

²⁶⁰ See Interview with Louis B. Goldman, *supra* note 257.

be forth- coming although he knows or should know that the expectation cannot be realized.²⁶¹

However, as that practitioner noted, there are provisions in U.S. law that account for the absence of statutory requirements to negotiate in good faith. Among others, mistake,²⁶² misrepresentation,²⁶³ negligence²⁶⁴ and estoppel²⁶⁵ might be argued as grounds to seek damages *if* a contract resulted. The major difference in the legal traditions here is that common law will not generally provide remedies for failed negotiations due to bad faith where no contract resulted, whereas civil law may impose liability even in the absence of a contract.

Across all of the practitioners that I spoke with, the risks were recognized, but clients were rarely counseled to choose a particular market on the basis of legal tradition as it relates to pre-contractual liability. This would seem to make sense as it is the legal practitioner that would be best positioned to craft language in letters of intent and other pre-contractual documents that would protect their client in any legal system. Thus, what the data appears to tell us is that the risks of negotiating in a common law environment, where little protection exists for pre-contractual promises, can be mitigated by effective legal counsel.

CONCLUDING REMARKS

This article began with a single question—do differences in pre-contractual liability between civil and common law jurisdictions affect the entrepreneurial environment in those jurisdictions? I conducted a quantitative analysis that showed a significant relationship between legal tradition and entrepreneurial activity. I then used interviews with cross-jurisdictional attorneys and extensive historical and current legal assessments to add context to the quantitative findings. The research shows legal traditions do affect the risk for entrepreneurs across legal environments; however, that risk can be mitigated with effective legal

²⁶¹ Friedrich Kessler and Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401, 404 (1964) (internal citations omitted).

²⁶² See Eric Rasmusen and Ian Ayres, *Mutual and Unilateral Mistake in Contract Law*, 22 J. OF L. STUD. 309 (1993).

²⁶³ See Mark P. Gergen, *Negligent Misrepresentation as Contract*, 101 CAL. L. REV. 953 (2013).

²⁶⁴ See Robert A. Seligson, *Contractual Exemption from Liability for Negligence*, 44 CAL. L. REV. 120 (1956).

²⁶⁵ See Kristina Bunting, *Estoppel by Convention and Pre-contractual Understandings: The Position and Practical Consequences*, 42 VICTORIA U. OF WELLINGTON L. REV. 511 (2011).

guidance and understanding of the differing degrees to which an investor's pre-contractual statements will affect his or her liability. Entrepreneurs operating without legal counsel equipped in cross-jurisdictional practice face the most significant risks.

This article, then, serves as a starting point for a broader discussion of inconsistencies across legal traditions with respect to commercial transactions. Globalization and interdependence have made cross-border contracts an almost foregone conclusion. Yet as business speeds ahead to find the best commercial relationships around the world, the law has yet to catch-up by providing predictable and consistent rules for commercial transactions across jurisdictions. And while earnest attempts to smooth over these choppy waters have been made in the past,²⁶⁶ parties with experienced legal counsel have preferred to resort to choice-of-law clauses that import their home rules and arbitration clauses that cut-out local courts in order to create the predictability that is missing in the judicial system.

Unwitting and bold entrepreneurs who choose to wade into the murky waters of cross-border contracts without experienced counsel may find themselves in dangerous territory.²⁶⁷ It is here that we must focus our inquiry to ensure that micro and small enterprises can take full advantage of the global business environment while minimizing the risks that are inherent in cross-border contract negotiation.

²⁶⁶ See United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. TREATY DOC. NO. 98-9 (1984).

²⁶⁷ See Patrick Delhanty, *Small Businesses Key Players in International Trade*, SMALL BUSINESS ADMINISTRATION ISSUE BRIEF NO. 11 (2015) (explaining that small businesses in the United States make-up 97% of all exporters).